Neutral Citation Number: [2026] EWHC 637 (Admin)

Case No: AC-2025-002697

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2026

Before :

MR JUSTICE BUTCHER

- -

Between :

THE PROFESSIONAL STANDARDS AUTHORITY	**Appellant**
- and -	
(1) THE NURSING AND MIDWIFERY COUNCIL	
(2) KWABENA NTOW	**Respondents**

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- -

Eleanor Grey KC (instructed by **TLT**) for the **Appellant**
Leeann Mohamed (instructed by **NMC**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented

Hearing date: 11 March 2026
Written Submissions: 12 March 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BUTCHER

Mr Justice Butcher :

1. The Professional Standards Authority ('PSA') appeals a decision dated 6 June 2025 ('the Decision') of a panel of the Fitness to Practise Committee ('the Panel') of the First Respondent ('the NMC') made under Part V of the Nursing and Midwifery Order 2001 (SI 2001/253). The Panel had heard a misconduct case against the Second Respondent ('the Registrant'). The Registrant is a nurse who, prior to and at the date of the Decision was registered with the NMC.

2. The PSA's appeal is brought under s. 29 of the National Health Service Reform and Health Care Professions Act 2002 ('the Act'). That section of the Act provides, in part:

> '(4) Where a relevant decision is made, the Authority [ie the PSA] may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
>
> (4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient –
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> (a) to protect the health, safety and well-being of the public;
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> (b) to maintain public confidence in the profession concerned; and
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> (c) to maintain proper professional standards and conduct for members of that profession.
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> …
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> (8) The court may –
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> (a) dismiss the appeal,
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> (b) allow the appeal and quash the relevant decision,
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> (c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or
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> (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.'

3. At the hearing on 11 March 2026, Ms Grey KC, for the PSA submitted that the appeal should be allowed if the decision of the Panel was (a) wrong or (b) unjust because of a

serious procedural or other irregularity in the proceedings. This was a reference to CPR r. 52.21(3) which, she submitted, applied to an appeal such as the present.

4. The Registrant was not present and was not represented at the hearing. I had to consider whether to proceed in his absence. I decided that it was appropriate to do so. He had been informed of the occurrence, date and time of the hearing. In a communication of 3 March 2026 from the NMC he had been told that he was not obliged to attend, but that if he did not do so, the court would not be able to consider what he might wish to say. He was sent a further message during the oral hearing notifying him that it was going ahead, and was then sent a copy of the written submissions put in by the Appellant shortly after the oral hearing. He has not responded to any of these. He has made no application to adjourn the hearing, and he has put forward no reasons why the hearing should not proceed. I have had in mind that the matter involves serious allegations, and that there is a public interest in its expeditious determination. Given all these matters it was in my judgment the right course both to hear the appeal, and now to proceed to give judgment.

Overview

5. The PSA advances three Grounds of Appeal. They may be summarised as follows:

(1) Ground 1. Procedural Irregularity / 'Under Prosecution': the NMC failed to secure that material evidence was placed before the Panel.

(2) Ground 2. Error in the Panel's approach to the half-time submission: the Panel wrongly failed to take account of all the evidence and surrounding circumstances in considering whether there was a case to answer on certain allegations.

(3) Ground 3. Impairment. Even on the basis of the factual findings that the Panel did make, the Panel wrongly failed to take proper account of the seriousness of the Registrant's conduct in determining the issue of current impairment.

6. The NMC agrees that each of those Grounds has merit, and that the appeal should be allowed. I have however required to be satisfied of these matters myself.

The allegations and the hearing before the Panel

7. The case against the Registrant which the Panel heard was based on allegations of non-consensual sexual intercourse and sexual activity with a colleague, 'Person A'. Both were nurses in the military, each holding the rank of corporal. The allegations, which were amended at the outset of the hearing, rearranged to follow the chronological sequence of events, were, in summary, as follows:

(1) On 16 August 2021, the Registrant had sexual intercourse with Person A, without her consent and without a reasonable belief that she was consenting (Charge 1a, taken with Charges 2a and 2b);

(2) On 7 February 2022, the Registrant had sexual intercourse with Person A, without her consent and without reasonable belief that she was consenting (Charge 1b, taken with Charges 2a and 2b);

(3) On 3 July 2022, the Registrant kissed Person A without her consent and without a reasonable belief that she consented (Charges 3d and 4);

(4) On 5 July 2022, the Registrant engaged in various sexual activities with Person A without her consent and without a reasonable belief that she consented (Charges 3b, e and f, and 4).

8. Person A's account was that all these encounters were non-consensual. The Registrant accepted that there had been sexual intercourse on 16 August 2021 and 7 February 2022, but his case was that it was consensual. His case was that certain other sexual activities were consensual, but he denied that certain aspects had occurred as alleged. I will return to the details of this, insofar as necessary, below.

9. The Panel heard the evidence of Person A, who was cross-examined by Special Counsel appointed by the NMC. On Day 4 the Panel then heard applications by the NMC to:

(1) Admit in evidence a forensic expert report, as hearsay evidence, to support the disputed charge 3f (which was that, 'On or around 5/7/22 kissed and/or sucked Person A's breast'). That application was refused by the Panel on the grounds that it would be unfair to the Registrant to admit the report as hearsay evidence.

(2) Admit in evidence a written Police Witness Statement from Person B, dated 1 August 2022, which was a statement from a friend of Person A, which spoke of a first complaint by Person A about the events of 5 July 2022, made to her on that day. The Registrant's position was that he would have wanted to ask questions of the witness. The Panel refused the application on the basis that it would be unfair to the Registrant to admit the statement as hearsay without the witness coming to give evidence.

10. After a final, unopposed, application to admit a summary of an interview with the Registrant, and further amendments to the charges, the NMC's case was then closed.

11. The Panel then heard a submission that, in a number of respects, there was no case to answer. The Panel made the following determinations:

(1) In relation to the charge as to sexual intercourse on 16 August 2021 1a), there was evidence to support the allegation that Person A had not consented. However, as regards Charge 2b (viz that the Registrant did not have a reasonable belief in her consent) the Panel said: 'The panel considered that Person A did not give a clear and coherent recollection of the incident and therefore found her account unreliable. The panel found that there was an inherent weakness/vagueness in the evidence and therefore, taken at its highest, a panel properly advised could not find the facts alleged in Charge 2b proved. The panel determined that there was no case to answer in respect to Charge 2 in its entirety.'

(2) In relation to Charge 3a (kissing / sucking below Person A's clavicle on 16 August 2021), there was evidence to support the factual allegation that it had occurred, and also a case to answer that Person A had not consented. However, as regards Charge 4b (absence of reasonable belief as to consent), the Panel said:

‘The panel found that Person A did not explicitly convey before you allegedly kissed her that she did not give consent to being kissed by you. She subsequently said she needed to get ready but did not at any time say that she did not wish to be kissed. Person A also said in oral evidence that her main concern was that she would have a mark there that would be visible when she went out that evening. The panel found that there was an inherent weakness / vagueness in the evidence and therefore, taken at its highest, a panel properly advised, could not find the facts alleged in Charge 4b proved. The panel determined that there was no case to answer in its entirety.’

(3) In relation to Count 3c (placing Registrant’s penis in Person A’s mouth on 16 August 2021), the Panel said: ‘The panel noted that, within her oral evidence, Person A was not able to describe how your penis had entered into her mouth. This was supported by her account within her ABE interview [quoted]. Accordingly, the panel determined that there was no evidence that you “placed your penis inside Person A’s mouth”, therefore there is no case to answer.’

(4) In relation to the charge as to sexual intercourse on 7 February 2022 (1b), there was evidence to support the allegation that Person A had not consented. However, as regards Charge 2b as relevant to this incident, the Panel said: ‘The panel considered that Person A had not expressed that she did not wish to engage in sexual intercourse with you [ie the Registrant] and it appeared that she was more concerned about not drawing attention to yourselves and about returning to her ward as she had been away for a while. Accordingly, the panel determined that there was no evidence that you acted without a reasonable belief that Person A had not consented therefore, there is no case to answer.’

(5) In relation to Charge 3g (ie that on or around 7 February 2022 the Registrant placed his penis in Person A’s mouth), the Panel said that Person A had failed, on a number of occasions, to answer questions from the police as to how the Registrant’s penis had come to be in her mouth, until she was asked a leading question. The Panel went on that it had ‘determined that as she was led to give the answer that [the Registrant] put [his] penis in her mouth, the evidence was of a tenuous character and therefore there is no case to answer.’

(6) In relation to an incident on 3 July 2022, Charge 3d was that on about that date the Registrant had kissed Person A on the neck. That was admitted, but in relation to Charge 4b as referable to this incident (ie as to whether the Registrant had had a reasonable belief that Person A consented), the Panel said: ‘The panel was therefore of the view that there was no evidence that you acted without a reasonable belief that she had consented to you kissing her prior to doing so, therefore, there is no case to answer.’

(7) Charges 3b, e and f related to an incident on 5 July 2022 and were, respectively, (b) that on or about that date the Registrant had rubbed Person A’s hands up and down his penis, (e) that the Registrant had placed his penis in her mouth, and (f) that he had kissed or sucked Person A’s breast. The Panel found that there was a case to answer, both as to what was alleged to have happened, and as to absence of reasonable belief in consent.

12. The upshot of the 'half time' rulings was accordingly that:

    (1) As regards the admitted sexual intercourse on 16 August 2021, and the associated kissing/sucking allegation, these were to be considered on the basis that they were consensual.

    (2) With regard to the sexual intercourse on 7 February 2022, this was to be treated as consensual, and the allegation that the Registrant had put his penis in Person A's mouth did not survive.

    (3) With regard to the kissing on 3 July 2022, this was to be treated as consensual.

    (4) In relation to the events on 5 July 2022, Charges 3b, 3e and 3f remained, together with the associated issue of consent.

13. The Panel then heard evidence from the Registrant. In its final determination, the Panel found that the facts alleged in Charges 3a and 3d were proved (but, as set out above, were treated as consensual). In relation to the Charges in 3b, 3e and 3f, the Panel found that those allegations had not been proved, and the Panel did not consider the issue of consent.

14. In light of these determinations, which meant that the only conduct found (or admitted) was that in Charges 1a, 1b, 3a and 3d, all of which were treated on the basis they were consensual, the NMC felt able only to make a positive case on misconduct in relation to Count 1b (sexual intercourse in a hospital disabled toilet during the working day). The Panel held that Charges 1a, 3a and 3d, as relating to acts between consenting adults in private accommodation, did not amount to misconduct. It found, however, that the actions in 1b did amount to misconduct. The Panel considered impairment, and made positive findings on insight and remediation. Overall, it reached the conclusion that the Registrant's fitness to practise was not currently impaired.

Legal Principles Applicable to a Reference under the Act

15. It will be necessary for me to consider in somewhat more detail the legal position and applicable authorities in relation to 'serious procedural or other irregularity'. Here it is convenient to refer to general guidance on the principles applicable to the determination of a reference by the PSA.

16. In Council for the Regulation of Health Care Professionals v General Medical Council & Ruscillo [2004] EWCA Civ 1356, it was said:

    > '[70] If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate. …
    >
    > [71] If the Court decides that the decision as to penalty was 'wrong', it must allow the appeal and quash the relevant

> decision…. It can then substitute its own decision under section 29(8)(c) or remit the case under section 29(8)(d).
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> [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) [now CPR 52.21(3)(b)] and section 29(8)(d) of the Act.
>
> [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.
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> …
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> [78] The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed.'

17. In <u>Bawa-Garba v General Medical Council</u> 2018] EWCA Civ 1879, the Court of Appeal said, at [67]:

> '…An appeal court should only interfere with such an evaluative decision [sc. of a specialist adjudicative body] if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide: *Biogen* at 45; *Todd* at [129]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2001] FSR 11 (HL) at [29]; *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5, [2004] RPC 34 at [31]. As the authorities show, the addition of "plainly" or "clearly" to the word "wrong" adds nothing in this context.'

Ground 1: Procedural Irregularity

18. The PSA's case in this respect is that there were procedural irregularities, which had led to evidence which should have been before the Panel being excluded by the Panel. As a matter of law, such matters, and other forms of what may be called 'under-prosecution', may amount to a serious procedural irregularity within CPR 52.21(3).

19. The specific matters relied on by the PSA here were two-fold.

    (1) In the first place, that the NMC had failed to make timely arrangements to secure the attendance at the hearing of Person B; and

    (2) Secondly, that the NMC had failed to make timely arrangements to secure the attendance of the author of the forensic report who had assessed a sample of saliva taken from Person A on 5 July 2022, and/or had failed to obtain a fuller expert report including details of the expert's expertise and qualifications and/or evidence of the process of sampling and the chain of evidence which underlay the expert's conclusions.

    The PSA contended that no good reason had been given by the NMC for these failures, or alternatively, for its failure to give proper advance notice of an intention to have the evidence admitted as hearsay evidence. The result was that the Panel refused to admit the evidence and proceeded without it. This evidence would have been particularly relevant to the incidents of 5 July 2022, and, potentially, to the Registrant's credibility more generally, given that there was a conflict of evidence as to what had happened that evening. The procedural irregularity was serious, in that, if the evidence had been heard, it might have made a significant difference to the Panel's conclusions. The PSA did not, I should record, put its case on the basis that the decision of the Panel not to admit the evidence was wrong.

20. The PSA referred to a number of cases which support the proposition that, in cases of references or appeals in the present type of case, there may be a procedural or other irregularity in the proceedings by reason of the 'under-prosecution' of the registrant or other practitioner, and that this may include both 'under charging', and mistakes by the NMC (or other 'prosecuting' body) in bringing forward appropriate evidence. In

this connexion, Ms Grey KC referred in particular to Ruscillo at paragraphs 80-83, where the Court of Appeal said:

> [80] The procedures for disciplinary proceedings under the various statutes referred to in section 29(1) of the Act are not identical [sc. to a criminal prosecution]. In general they involve a preliminary investigation of conduct of the practitioner of which complaint has been made. If it is decided to bring disciplinary proceedings, a charge will be proffered which alleges the facts relied upon as demonstrating professional misconduct. Admissions may be made by the practitioner, facts may be agreed and evidence may be called. The disciplinary tribunal will be faced with an act or omission, or more typically a course of conduct, which it is alleged constitutes professional misconduct. *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.*
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> …
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> [82] At the same time there will be cases where it is in the public interest that additional evidence should be placed before the court on a reference under section 29. This may be necessary to ensure that a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk.
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> [83] Where an application is made to the Court to adduce additional evidence pursuant to CPR 52.11(2) the Court should not apply the principle in *Ladd v Marshall* [1954] 1 WLR 1489. The principles in that case have no application to a reference under section 29. The fact that the evidence could have been, but was not, placed before the disciplinary tribunal can have no bearing on whether it should be admitted by the Court. The Court will, however, be concerned, just as the Council should be, to be sure that the introduction of such evidence is truly in the public interest.'

21. Ms Grey KC both emphasised the passage which I have italicised, and pointed out that the determination that Ladd v Marshall rules did not apply to the admission of fresh evidence that had not been put before the tribunal was significant, as it confirms that error on the part of the disciplinary tribunal itself is not the key to 'procedural error' when applying s. 29, and also means that the basis for challenging decisions in the present type of case is wider than it will be in many other contexts (including most other civil cases).

22. In the wake of Ruscillo judges in other cases have regarded 'under prosecution' as being capable of constituting an irregularity which may permit the quashing of a

decision by a disciplinary tribunal and/or its remission. Examples are R (Council for the Regulation of Health Care Professionals) v General Medical Council & Dr Rajeshwar [2005] EWHC 2973 (Admin) (undercharging by failure to allege a sexual motivation), Council for the Regulation of Health Care Professionals v Nursing and Midwifery Council & Michelle Kingdom [2007] EWHC 1806 (Admin) (undercharging by failure to allege dishonesty) and PSA v GCC & Briggs [2014] EWHC 2190 (Admin). In Kingdom, Beatson J made the point (at [25]) that 'the whole process is to be examined and not just procedural decisions during the hearing', and this point was reiterated by Lang J in Briggs (at [17]).

23. Thereafter, in PSA v Nursing and Midwifery Council and Jozi [2015] EWHC 764 (Admin), Singh J considered undercharging to be a serious procedural irregularity ([24]-[27]), and also the failure by the NMC to put appropriate evidence before the panel likewise to be a serious procedural irregularity ([30]-[32]), as was failure by the panel to intervene when evidence was insufficient ([33]).

24. More recently, in PSA v Nursing and Midwifery Council & Lembethe [2019] EWHC 3326 (Admin), Steyn J said this at [63]-[67]

> [63] The Authority's final ground of appeal is that "the way in which the case against the Registrant was charged and/or prosecuted meant that important aspects of the Registrant's conduct were not considered adequately or at all". Put in that way, the ground is without foundation. The Authority has not raised any concern about the adequacy of the charges laid against the Registrants. Nor can it be said that the way in which the cases were prosecuted meant the Panel did not consider the key aspect of the Registrants' conduct, namely whether they had been dishonest.
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> [64] However, Mr Mant submitted that the NMC's failure to obtain and exhibit the email, disclosing it in good time before the hearing to the Registrants, amounted to a form of "under-prosecution" equivalent to the prosecutorial failings in *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Jozi* [2015] EWHC 764 (Admin) ("Jozi") and *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and X* [2018] EWHC 70 (Admin) ("X").
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> [65] In *Jozi* Singh J allowed an appeal on grounds including a failure by the regulator to put crucial evidence before the panel [30]-[32] and a failure by the panel to intervene where the evidence was insufficient [33]. In *X* a decision of the NMC to offer no evidence was overturned on various grounds including the regulator's flawed approach to evidence gathering. …
>
> [66] Mr Standing submitted that the threshold is high for the court to allow an appeal on the basis of mistakes by the

> regulator in prosecuting disciplinary proceedings. He emphasised that in *Ruscillo* at [83] the Court of Appeal said that, on appeal, the court would be concerned to determine whether the introduction of new evidence is "truly in the public interest" (emphasis added). He submitted that the mistakes made in this case did not reach that level.
>
> [67] I accept that for this ground to succeed the mistakes on the part of the regulator must be shown to be serious.

25. In conformity with this line of authority, I accept that a failure on the part of NMC to present relevant evidence to a panel can be regarded as a procedural irregularity. As such, if serious enough, and such as to make the decision 'unjust', it can be a ground for a successful appeal under CPR 52.21(3)(b).

26. In the present case, I accept that the failure of the NMC to secure the attendance of the two witnesses was, for these purposes, a procedural irregularity. There appears to have been no good reason for these failures. I also accept that this irregularity was serious. The evidence of these witnesses was capable of providing support for Person A's account of the events of 5 July 2022. The allegations relating to that day were themselves serious. I also consider that the evidence might have made a significant difference to the Panel's conclusions in relation to the incident of 5 July 2022. That is not to say that it necessarily would have done so, but it might have done, especially given that the Panel had to make its decisions on the basis of the balance of probabilities.

27. I also consider that a procedural irregularity has left a position where the unheard evidence might have made a significant difference in relation to the Panel's conclusions as to the incident on 5 July 2022 to be unjust for the purposes of CPR 52.21(3)(b). In the context of a reference pursuant to s. 29 of the Act, and given the need for the protection of the public, such a possibility must constitute an injustice. Potential prejudice to the Registrant, in the form of the continuance of the proceedings and potentially having to go through another hearing, while it is a factor to be taken into account in assessing whether there is injustice, has to be set against the injustice involved in what may be inadequate protection of the public, and will usually, as do considerations of double jeopardy more generally, 'take second place' (see Ruscillo at [42]).

Ground 2: The approach to the 'half-time' application

28. The PSA contends that the approach of the Panel to the testing of the evidence before it at the 'half-time' stage was fundamentally flawed. Thus, it was submitted:

    (1) The Panel had failed to consider all the evidence relating to each allegation in the round or at its highest.

    (2) Further or alternatively, in relation to its half-time findings on Charges 2 and 4, the Panel had failed to give any proper attention to the test for 'reasonable belief in consent' under s. 1(2) and/or s. 3(2) Sexual Offences Act 2003, which required

an approach whereby '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents'. The Panel had also failed to give any proper consideration to whether there is an inherent implausibility or inconsistency in finding, repeatedly, on the one hand that there was a case to answer as to whether Person A had not consented, but no case to answer as to whether the Registrant did not have a reasonable belief in consent.

(3) The Panel had failed to consider relevant guidance, including the CPS guidance on Rape and Sexual Offences. This guidance included that it is false that victims can always provide a clear and coherent account of being raped, that rape can be traumatic and memory can be affected in a number of ways, and that consent must be actively given.

(4) The Panel failed to show in its reasons that it had considered the above issues, or properly addressed them.

29. In relation to the legal test which the Panel should have adopted in considering the 'half-time' submission, the PSA referred to the governing authority of R v Galbraith (1981) 73 Cr. App. R. 124, which lays down that: (1) if there is no evidence that the crime has been committed by the defendant the judge should stop the case; (2) if there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or inconsistency then (a) where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, then he or she must stop the case, but (b) where the evidence is such that its strength or weakness depends on the view to be taken of a witness's credibility or other matters which are within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly convict, then the judge should allow the matter to be tried by the jury (see per Lord Lane CJ at 127).

30. Ms Grey KC for the PSA also drew my attention to the case of R v Shippey [1988] Crim LR 767, with its well-known admonition that taking the prosecution case at its highest did not mean taking the plums but leaving the duff behind. That case, however, is a decision on its own facts, and establishes no new principle: see R v Pryer [2004] EWCA Crim 1163.

31. In my judgment, the decisions of the Panel insofar as it found that there was no case to answer on a number of charges were wrong. They appear to have been affected by errors of principle, but in any event fell outside the bounds of what the Panel could reasonably decide. I will take them in turn, though there is an overlap in the considerations relevant to each.

32. As to the holding of no case to answer in relation to charge 2b as it referred to sexual intercourse on 16 August 2021, the Panel failed to consider the evidence which there was at the half time stage in its entirety. In particular it failed to consider that, if Person A had not consented, as to which it held there was a case to answer, that might itself be evidence that the Registrant could not have had a reasonable belief in her consenting, because her absence of consent could be expected to have been apparent

to a reasonable person. There was, moreover, at the 'half way' stage, no evidence to put in the balance on the other side to the effect that the Registrant had believed (whether reasonably or at all) that Person A was consenting. Furthermore, there was a more specific error in approach in the Panel's reasoning that because Person A had not given a 'clear and coherent recollection of the incident', 'therefore' her account was 'unreliable'. The fact that no clear or coherent recollection is given of an incident of sexual assault does not, of itself, indicate that the complainant's account is unreliable. Finally, the Panel had not, in truth, taken the NMC's evidence 'at its highest' as it suggested that it had. It did not reflect on the fact that, on its own findings as to there being a case on lack of consent, there was a case of non-consensual intercourse, and the implications of that both as to what might have been reasonably believed by the Registrant, and as to the possible effect of such a non-consensual event on the coherence of the account given by Person A.

33. As to Charge 3a, many of the same points apply. The Panel did not consider that, given that there was a case to answer as to absence of consent, that of itself could provide a basis for concluding on the balance of probabilities and in the absence of evidence to the contrary, that there had not been a reasonable belief in consent. The Panel's reasoning in relation to Charge 3a is also flawed in a more specific way. Thus the Panel relied on the fact that Person A had not 'explicitly conveyed', prior to being kissed, that she did not consent to being kissed. That is the only matter relating to whether there was consent at the time of the kissing to which the Panel did refer: the other matters, that she said she needed to get ready and as to concern about a mark, were clearly subsequent. The Panel does not appear to have considered that consent is an active matter, and a lack of an explicit statement of lack of consent did not mean, without more, that the Registrant would reasonably have believed that there was consent. The Panel also failed to take into account that there was no evidence, at the half way stage, that the Registrant had taken any steps to ascertain that Person A did consent.

34. In relation to Charge 3c, given that there was no dispute that the Registrant's penis had been in Person A's mouth, and Person A's evidence had not indicated any other way in which that had happened, there was, in my view, clearly a case to answer that the Registrant had placed his penis in her mouth. The conclusion of the Panel to the contrary was not one reasonably open to it.

35. In relation to the issue as to reasonable belief in consent in relation to sexual intercourse on 7 February 2022, the position is similar to that in relation to the issue of belief in consent as to sexual intercourse on 16 August 2021. For reasons similar to those I have given in relation to that, I consider that the Panel's finding of no case to answer here also to have been wrong. The Panel failed to consider all the evidence at the half way stage, and the implications of their acceptance that there was a case to answer as to absence of consent. Equally, the Panel appears to have considered the fact that Person A had not expressed that she did not want sexual intercourse to be significant, without considering that there was no evidence, at the half way stage, that the Registrant had taken any steps to ascertain that Person A was consenting, or that he had believed that she was.

36. In relation to Charge 3g, the position is effectively the same as in relation to Charge 3c. Further, in this case, the Panel has not taken the evidence of Person A at its highest. She had given an answer that the Registrant put his penis in her mouth; the fact that it was given in answer to what the Panel described as a 'leading question' did not mean that it was not evidence, nor mean, of itself, that it was 'of a tenuous character' and that 'therefore' there was no case to answer.

37. In relation to Charge 4b as referable to Charge 3d (ie the kissing on 3 July 2022), the position is similar in relation to the issue of reasonable belief as to consent in relation to Charge 3a. The Panel did not properly consider the implications of the fact that it accepted that there was a case to answer as to Person A's not having consented. Equally, the Panel clearly took too atomised a view of the evidence in finding that, though Person A had given evidence that she had said no, and made an excuse, after the Registrant had kissed her, there was no evidence that he had acted without a reasonable belief that she had consented to being kissed prior to that happening. Given that there was evidence that she had not consented, and evidence that just after the kissing she had said no, and that there was no evidence at the half way stage that the Registrant had taken steps to ascertain that she did consent, or that he believed that she did, there was a case to answer on this aspect.

38. Accordingly I conclude that the Panel was wrong in its determinations that there was no case to answer in relation to the issues of belief in consent as related to Charges 1a, 1b, 3a and 3d, and as to Charges 3c and 3g.

Ground 3

39. Despite the fact that it is now accepted by the NMC that Ground 3 has merit and should lead to the quashing of the Panel's determination on current impairment, had this point stood alone, I would not have upheld it. I would have regarded this as an evaluation where weight should be accorded to the expertise of the Panel. As I am going to quash the Panel's determination on the basis of Grounds 1 and 2, however, there will necessarily have to be a new assessment of impairment (though it will be open to the new panel, on remission, to come to the same assessment as was made by the Panel, should that be appropriate in the light of the new panel's findings).

Disposal

40. For the reasons I have given, I uphold the PSA's appeal in relation to Grounds 1 and 2. I will quash the Panel's Decision, and remit the case for fresh consideration by a differently constituted panel.