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Case No: CO/3565/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2019

**Before** :

**LORD JUSTICE HOLROYDE**

**and**

**MRS JUSTICE JEFFORD DBE**

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**Between :**

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| **THE QUEEN on the application of SIMON BRAMHALL** | **Claimant** |
| **- and -** | |
| **THE GENERAL MEDICAL COUNCIL** | **Defendant** |

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**Mr Jonathan Holl-Allen QC** (instructed by **RadcliffesLeBrasseur**) for the **Claimant**
**Mr Peter Mant** (instructed by **GMC Legal**) for the **Defendant**

Hearing dates: 6 November 2019

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# Approved Judgment

## Mrs Justice Jefford:

### *Introduction*

1. In 2013, the Claimant, Mr Simon Bramhall was employed by the University Hospitals Birmingham NHS Foundation Trust ("the Trust") as a consultant surgeon. His specialisation was in liver transplant surgery. Towards the end of 2013, in circumstances I shall set out further below, it came to light that, on at least two occasions in 2013 and at the conclusion of transplant surgery, Mr Bramhall had used an argon beam coagulator to place his initials on the patient's transplanted liver.

2. The second occasion was reported to the Trust at the end of 2013 and Mr Bramhall was suspended. Subsequently, in February 2017, following consideration by two Case Examiners, Mr Bramhall was issued with a warning by the defendant, the General Medical Council ("the GMC"). This warning was issued in respect of what was referred to in these proceedings as the misconduct allegation. The claimant was also the subject of a police investigation and criminal charges. In December 2017 he pleaded guilty in the Crown Court at Birmingham to two offences of common assault. He was sentenced on 12 January 2018.

3. Those convictions and sentences have led to what, with some justification, was described by counsel for Mr Bramhall as an unusual if not unprecedented sequence of events concerning further disciplinary proceedings by the GMC. It is that sequence of events that has led to this claim for judicial review of three decisions of the GMC. Those decisions are (1) the decision notified to the claimant by letter dated 14 March 2017 to review the decision to issue him with a warning; (2) the decision notified to him by letter dated 6 June 2018 to refer the misconduct allegation back to the Case Examiners; and (3) the decision notified to him by letter dated 4 July 2018 to refer the allegation relating to his convictions to the Medical Practitioners Tribunal which would consider whether the claimant's fitness to practise was currently impaired.

### *The regulatory framework*

4. Before I turn both to the complex chronology of this matter and the relevant decisions, it is necessary to set out the statutory and regulatory framework in which those decisions were made and this claim has arisen.

5. Section 1A of the Medical Act 1983 defines the objectives of the GMC in terms of the protection, promotion and maintenance of the health and safety of the public. By Section 1B that includes the promotion and maintenance of public confidence in the medical profession.

6. In pursuit of those objectives, the GMC's functions include the investigation of allegations that a person's fitness to practise is impaired. Section 35C provides as follows:

> "(1) This section applies where an allegation is made to the General Council against—
>
> (a) a fully registered person; or
>
> (b) a person who is provisionally registered,
>
> that his fitness to practise is impaired.
>
> (2) A person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of—

(a) misconduct;

(b) deficient professional performance;

(c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;

(d) adverse physical or mental health; or

(e) a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect."

Subsection (2) sets out necessary but not sufficient grounds of impairment. In other words, a person is not necessarily unfit to practise because he has a criminal conviction but a conviction, or one of the other matters set out in this subsection, is a necessary precursor to any finding that a person's fitness to practise is impaired.

7. By section 35CC(3), section 35C applies if, without an allegation being made, it comes to the attention of the GMC that a person's fitness to practise is called into question by one of the matters in subsection (2).

8. The investigation of an allegation may result in a reference to a Medical Practitioners Tribunal. Under section 35D, if that tribunal finds a person's fitness to practise impaired, it has sanctions available to it of erasure, suspension or the imposition of conditions. Under subsection (3), where the tribunal does not make a finding that a person's fitness to practise is impaired, the tribunal may nonetheless give a warning as to future conduct or performance.

9. The General Medical Council (Fitness to Practise) Rules 2004 (as amended) are made pursuant to powers under the Act. They contain the following:

(i) Rule 2 headed Interpretation sets out various defined terms. As relevant to these proceedings, these include:

(a) *""allegation" means an allegation that the fitness to practise of a practitioner is impaired …."*

(b) *""Case Examiner" means a medical or lay officer of the General Council appointed by the Registrar for the purposes of exercising the functions of the [Investigation Committee]…"*

(c) *""Medical Practitioners Tribunal" means a Medical Practitioners Tribunal constituted under rules made under paragraph 19G of Schedule 1 to the Act."*

(d) *""MPTS" means the Medical Practitioners Tribunal Service constituted under rules made under paragraph 19F of Schedule 1 to the Act."*

(e) *""Tribunal" means a Medical Practitioners Tribunal or ….."*

(ii) Rule 4 (headed Initial Consideration and referral of allegations):

*"(1) An allegation shall initially be considered by the Registrar.*

*(2) Subject to paragraphs (3) to (5) and rule 5, where the Registrar considers that the allegation falls within section 35C(2) of the Act, he shall refer the matter to a medical and a lay Case Examiner for consideration under rule 8. ...."*

(iii) Rule 5:

*"(1) Subject to rule 4(5), the Registrar shall refer an allegation falling within section 35C(2)(c) of the Act relating to a conviction resulting in the imposition of a custodial sentence, whether immediate or suspended, directly to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal.*

*(2) Subject to rule 4(5), the Registrar shall refer any other allegation falling within section 35C(2)(c) or (e) of the Act directly to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal, unless he is of the opinion that it ought to be referred to a medical and a lay Case Examiner under rule 8."*

(iv) Rule 7 (Investigation of allegations):

*"(1) As soon as is reasonably practicable after referral of an allegation for consideration under rule 8, the Registrar shall write to the practitioner –*

*(a) informing him of the allegation and stating the matters which appear to raise a question as to whether his fitness to practise is impaired;*

*(b) providing him with copies of any documents received by the General Council in support of the allegation;*

*(c) inviting him to respond to the allegation with written representations within the period of 28 days from the date of the letter; and*

*(d) informing him that representations received from him will be disclosed, where appropriate, to the maker of the allegation (if any) for comment.*

*(2) The Registrar shall carry out any investigations, ..., as in his opinion are appropriate to the consideration of the allegation under rule 8. ...."*

(v) Rule 8:

*"(1) An allegation referred by the Registrar under rule 4(2), 5(2), 12(6)(b) or 28(2)(b) shall be considered by the Case Examiners.*

*(2) Upon consideration of an allegation, the Case Examiners may unanimously decide –*

*(a) that the allegation should not proceed further;*

*(b) to issue a warning to the practitioner in accordance with rule 11(2);*

*(c) ...; or*

*(d) to refer the allegation to the MPTS for them to arrange for determination by a Medical Practitioners Tribunal.*

*...*

*(4) As soon as reasonably practicable, the Case Examiners shall inform the Registrar of their decision, together with the reasons for that decision, and the*

*Registrar shall notify the practitioner and the maker of the allegation (if any), in writing, accordingly.*

*…"*

(vi) Rule 11 makes various provisions for the issue of a warning where the Case Examiners are satisfied that the allegation ought not to be referred to the MPTS.

(vii) Rule 12 (Review of decisions):

*"(1) Subject to paragraph 2, the following decisions may be reviewed by the Registrar –*

*(a) a decision not to refer an allegation to a medical and a lay Case Examiner or, for any other reason, that an allegation should not proceed beyond rule 4;*

*(b) a decision not to refer an allegation to the Committee or to the MPTS for them to arrange for it to be considered by a Medical Practitioners Tribunal;*

*(c) a decision to issue a warning in accordance with rule 11(2), (4) or (6)*

*…..*

*(2) The Registrar may review all or part of a decision specified in paragraph (1) on his own initiative or on the application of the practitioner, the maker of the allegation (if any) or …. when the Registrar has reason to believe that –*

*(a) ….*

*(b) there is new information which may have led, wholly or partly, to a different decision,*

*but only if one or more of the grounds specified in paragraph (3) are also satisfied.*

*(3) Those grounds are that, in the opinion of the Registrar, a review is –*

*(a) necessary for the protection of the public;*

*(b) necessary for the prevention of injustice to the practitioner; or*

*(c) otherwise necessary in the public interest.*

*…*

*(6) Where the Registrar, taking account of all relevant material including that obtained under paragraph (5), concludes that all or part of a decision specified in paragraph (1) was materially flawed (for any reason) or that there is new information which would probably have led, wholly or partly, to a different decision and that a fresh decision is necessary on one or more of the grounds specified in paragraph (3), he may decide –*

*(a) …..*

*(b) that an allegation should be referred for reconsideration by the Case Examiners under rule 8, 10 or 11.*

*Otherwise, he must decide that the original decision should stand."*

10. In summary, therefore, the effect of the rules is as follows:

    (i) Subject to the provisions of rule 5, where the Registrar considers that an allegation raises an issue of impairment of fitness to practise, he must refer it to the Case Examiners under rule 8. The wording of rule 4(2) is mandatory.

    (ii) The order of proceedings under rules 7 and 8 is not clearly expressed. The intended procedure appears to be that the Registrar refers the allegation to the Case Examiners under rule 8 but they do not proceed to their consideration until after the investigation under rule 7. That investigation includes the notification of the allegation to the practitioner, the provision to the practitioner of documents in support of the allegation, and an opportunity for the practitioner to respond to the allegation.

    (iii) The Case Examiners then proceed to their consideration under rule 8. The disposals open to them are set out in rule 8(2) and include referring the allegation to the MPTS for them to arrange for determination by a Medical Practitioners Tribunal.

    (iv) Rule 4(2), is, however, subject to rule 5. Where the practitioner is the subject of a conviction attracting a non-custodial sentence, rule 5(2) applies. Under that rule the Registrar must refer the allegation directly to the MPTS – the wording is again mandatory – unless he is of the opinion that it ought to be referred to the Case Examiners under rule 8.

    (v) The Registrar may review a decision (of the Case Examiners) to issue a warning if he has reason to believe that there is new information which may have led, wholly or partly, to a different decision. However, he may only do so if, in his opinion, one of the grounds in rule 12(3) is satisfied.

    (vi) If, having reviewed the decision, he concludes that there is new information which would probably have led wholly or partly to a different decision and that a fresh decision is necessary for one or more of the reasons in rule 12(3), he may refer the allegation to the Case Examiners for reconsideration including reconsideration under rule 8.

    (vii) If the Registrar does refer the allegation back to the Case Examiners, the provisions of rule 8 are engaged. (as set out in rule 8(1)) That may have the effect that the rule 7 procedure must then be gone through again. As I mention below, that was the claimant's argument but it is unnecessary to decide the point.

11. The GMC guidance on warnings (published February 2018) contains the following statements:

    *"22. There is a presumption that cases involving a conviction or caution should proceed to a medical practitioners tribunal. There will, however, be cases involving minor convictions or cautions that do not require referral to a medical practitioners tribunal or that, having been referred to a tribunal, are not considered serious enough to warrant a finding of impaired fitness to practise.*

    *23. Examples of convictions and cautions that have resulted in a warning include one-off drink driving offences where we are satisfied that there are no underlying health concerns, disorderly behaviour (without violence) while drunk or minor criminal damage. As stated earlier, each case must be considered on its own merits and the*

*response will depend on the particular circumstances of the case. The decision maker will need to consider, in addition to the illegality of the conduct, if there are any other reasons why repetition may cause concern, having in mind any issues of patient protection, the public's confidence in the profession or the reputation of the profession (for example, whether in relation to a conviction or caution for affray, this reveals a tendency toward violence in confrontational situations)."*

12. The earlier version of the Guidance, published in December 2015 and current at the time the Case Examiners took their decision to issue a warning, also gave as an example of a criminal conviction that had resulted in a warning "common assault outside the context of the doctor's professional practice".

13. The GMC has also published Guidance on "Making decisions on cases at the end of the investigation stage: Guidance for the Investigation Committee and case examiners":

    (i) This Guidance also addresses convictions (at paragraph 12) as follows:

    *"Convictions resulting in a custodial sentence are referred direct by the Registrar to a medical practitioners tribunal. There is a presumption that the same will apply to cautions, non-custodial convictions, and determinations of other regulatory bodies. However, in some cases a warning will be the appropriate response. There are also a number of minor offences (such as parking offences) where no formal GMC action will be required. Guidance on the handling of convictions and determinations is attached at Annex D."*

    (ii) Annex D: Guidance on convictions, cautions, determinations and other methods of police disposal (in the form published March 2017), makes reference to rule 5(2) and, at paragraph 7, states that in determining whether to exercise the discretion to refer a conviction or caution to the case examiners, the Registrar will give consideration to the type and nature of the offence; the seriousness of the offence; whether there is a significant risk to the public of serious harm caused by the doctor committing further offences; the type of sentence imposed; and any other information available. The balance of the Annex then addresses the likely approach to specific offences such as motoring offences, drink driving offences, and matters attracting cautions and fines, and seeks to identify matters (such as ASBOs) that are not, in law, criminal convictions.

    (iii) Paragraph 14 also sets out the test that the case examiners will apply at the conclusion of the investigation stage:

    *"The investigation committee or case examiner must have in mind the GMC's duty to protect the public which includes promoting and maintaining the health and safety and well-being of the public; public confidence in the profession; and, proper standards and conduct for doctors, in considering whether there is a realistic prospect of establishing that a doctor's fitness to practise is impaired to a degree justifying action on registration."*

***Chronology***

14. In May 2014, following an investigation by the Trust, a finding of gross misconduct was made at a disciplinary hearing. Further, on 23 May 2014, the GMC was contacted by West Midlands Police and told that they had received a complaint from a patient whose liver had been marked and that a criminal investigation had been opened.

15. The police investigation commenced no later than August 2014 but no decision was taken to prosecute until February 2017. In the meantime, the GMC confirmed with the West Midlands Police that the police were happy for the GMC to continue its own investigations.

16. In January 2016, the police informed the GMC that they had offered the claimant a caution for assault occasioning actual bodily harm but that he had refused to accept the caution.

17. By a letter dated 11 May 2016, the GMC informed the claimant's solicitors that they intended to proceed to disclose an allegation and supporting evidence under rule 7 despite the fact that there had, as yet, been no outcome from the police investigation. Given the procedure set out above, it appears that a decision had been taken under rule 4 to refer the allegation to the Case Examiners under rule 8, the allegation had been so referred, and the stage of disclosure under rule 7(1) had been reached.

18. By letter dated 12 May 2016 (sent by e-mail), the claimant's solicitors, Radcliffes Le Brasseur ("RLB"), asked the GMC to consider deferring the issuing of the rule 7 notice. They pointed out that the police investigation was still ongoing; they contended that it would be difficult for the claimant to respond to the rule 7 notice until he knew whether criminal proceedings would be commenced; and they said that "the outcome of the criminal investigation must be of direct relevance to the appropriate disposal of the case at the Rule 8 stage". The GMC subsequently agreed to this deferral, as it expected a charging decision that month. In the event, that did not happen. The GMC sought regular updates from the police but reached the point where it was decided to proceed even without knowing whether there would be a criminal prosecution.

19. The Assistant Registrar then wrote to the claimant on 14 September, under rule 7, setting out "the facts which if proved could suggest your fitness to practise is impaired because of misconduct". The principal facts (set out in Annex A) were as follows:

    *"1. On 21 August 2013 you performed a liver transplant on Patient A and you used the argon diathermy device, also known as the argon beam coagulator ("ABC") to:*

    *a. coagulate blood on the surface of Patient A's liver;*

    *b. write the letters "SB".*

    *2. On more than one other occasion, you have used the ABC to:*

    *a. coagulate blood on the surface of liver following implantation;*

    *b. write the letters "SB", or marking to that effect."*

    Annex B contained the various documents relied on.

20. By letter dated 4 October 2016, RLB asked for an extension of time to respond. Referring to their letter of 12 May 2016, they repeated that they had concerns about proceeding under rule 8 while the police investigation was proceeding and the charging decision outstanding. The letter continued:

    *"In the unlikely event that the CPS subsequently advises that criminal proceedings should be commenced, we anticipate inviting the GMC to suspend further consideration of the case until the outcome is known."*

21. The claimant's written response was then sent by letter from RLB dated 26 October 2016. It ran to 23 single-spaced pages setting out the claimant's position on the facts, fitness to practise, and the appropriate disposal. The letter again noted that there was a possibility - albeit, it said, a remote one - that criminal proceedings would be commenced. So far as the facts were concerned:

    (i) It was pointed out that the claimant's response to, and acceptance of, the facts in Annex A, item 1 relating to Patient A were already to be found in the documents, and the claimant was said to have provided open, honest and detailed responses to this allegation from the outset. His explanation for what had happened on this occasion was that, at the end of a difficult transplant operation, he had made:

    *"a misguided attempt to alleviate both tension and exhaustion amongst the theatre team, following an extremely demanding and stressful procedure, upon which the patient's life ultimately depended."*

    (ii) The letter recited the background to how this "misguided attempt" had come to light. The liver transplant had, in the event, failed and Patient A had undergone a second transplant operation a little over a week later. By that time the first transplanted liver was inflamed and the markings made by the claimant were significantly larger and more prominent than they had been. When first made the markings had been about 3 cm in height. A photograph had been taken. None of this was reported to the Trust until the end of 2013 and it was then leaked to the press. The patient wrongly concluded that that had caused the failure of the first transplant – that was not, in fact, the case and the failure was the result of prior damage to the transplanted liver. I do not understand this summary of the background to be disputed.

    (iii) There was then a full investigation during which evidence emerged that the claimant had marked other transplanted livers during the period February to August 2013 which, at the disciplinary hearing in May 2014, he had also admitted.

    (iv) The nature of that admission was explained more fully as follows:

    *"Mr Bramhall's position at the start of the Trust investigation had been that he had no recollection of any other occasions upon which he had marked transplanted livers, and that the case of Patient A had fixed in his memory because it had been a particularly difficult procedure, and because (albeit some four months later). the complaint had been drawn to his attention, supported by the photograph …*

    *That remains Mr Bramhall's position. He cannot recall having marked other livers. However, when presented with evidence to the contrary from his colleagues he did not seek to deny that there had been other occasions; simply that he could not remember those occasions.*

    *…*

    *He believes that his failure to recall other incidents was the product of having known at the time that no harm could possibly be caused to the patient, and that but for the sequence of events that unfolded in the case of Patient A, no adverse consequences could possibly flow from his actions. …"*

22. The Case Examiners then considered the allegation and, on 7 February 2017, issued a written warning. Their detailed reasons were given in a letter dated 9 February 2017. Those reasons set out somewhat more fully the background in terms particularly of Mr Bramhall's admissions of the allegation.

23. The Case Examiners recited that, early in the investigation, the claimant had admitted the marking made in August 2013. He said that he had "flicked his wrist" and made the mark of his initials in a light-hearted attempt to relieve the tension in theatre. During the Trust's investigation, he denied that he had initialled livers on other occasions, although accepting that someone might have thought he had made a squiggle. Although others described witnessing him marking livers after operations, including inscribing his initials, he continued to deny that he had done so. Amongst the witnesses to that effect were an anaesthetist who had seen the claimant inscribe his initials on a liver transplanted in February 2013 and a surgical registrar who recalled him doing so on 15 June 2013. At a further interview, the claimant maintained that he could not recall another incident and said that he was certain he would have remembered it. The conclusion of the Trust's investigation was that it was not an isolated incident. The disciplinary panel in May 2014 recorded:

*"The Panel do believe that your responses to the Investigating Team have not been completely honest and that you have been untruthful at times. The Panel found that you admitted the behaviours occurred on one occasion, then stipulated that you did not recollect other occasions and then today, when your representative on your behalf, stated that you did accept that the behaviour occurred on other occasions, it was the times and dates which you could not now recollect….."*

24. The Case Examiners set out the reasons for their decision. They accepted the evidence, including that from the GMC, that the claimant's actions did not contribute to the failure of Patient A's first transplanted liver, that patients were not put at risk or harmed clinically, and that there was little or no risk of repetition. They considered that the case now exclusively concerned matters of public confidence in the profession, emphasising the importance of respecting patients' dignity and maintaining patients' and the public's trust in the practitioner and the profession. Their reasons continued:

*"We note the submissions that none of the four categories for which there is a presumption of impairment is engaged here. One of those categories is violence, which we consider possibly apt to the actions Mr Bramhall took in relation to Patient A and other patients' livers. We have carefully considered the main guidance for case examiners on making decisions at the end of investigations, as well as the guidance on warnings, which includes examples of misconduct (usually involving criminal sanction) that have resulted in warnings, such as common assault outwith the context of a doctor's medical practice. While we note the legal arguments about the alleged criminality of Mr Bramhall's actions, we do not consider them particularly relevant to our decision.*

*The primary purpose of the GMC's fitness to practise proceedings is to protect the public against future harm from those who are not fit to practise, rather than to punish a doctor for past misdoings. We must decide whether there is a realistic prospect of establishing that the doctor's fitness to practise is currently impaired: this decision looks forward to what a doctor may do now or in the future, rather than to actions committed in the past. …*

*…*

*Having very carefully considered all the evidence, the submission about Mr Bramhall's insight, remorse and remediation, we do not consider this to be such a case and, accordingly, concluded that there is not a realistic prospect of establishing current impairment."*

It followed that the sanction against the claimant was that of a warning in accordance with Rule 11(2), the Case Examiners having concluded that the allegation ought not to be referred to the MPTS for them to arrange for it to be considered by the Medical Practitioners Tribunal because there was no realistic prospect of a finding that the claimant's fitness to practise was currently impaired, applying the test in the Guidance referred to above.

25. Shortly thereafter, in late February 2017, the claimant was informed that he was to be charged with two counts of assault occasioning actual bodily harm. The two counts arose out of the February 2013 incident, as reported by the anaesthetist, and the August 2013 incident involving Patient A. It had plainly taken some considerable time for the CPS to decide to bring criminal proceedings and on what charges. It is apparent, not least from the sequence of events set out in RLB's rule 7 letter of 26 October 2016, that the delay in charging the claimant was not the product of simple inactivity. The claimant first attended a voluntary police interview under caution in August 2014. The claimant provided a written statement in advance together with a report which concluded that there had been no damage to the liver transplanted to, and no harm to, Patient A. The matter was submitted to a Special Casework Division, some expert evidence was obtained, and advice was sought from Queen's Counsel. The caution was subsequently offered on the basis that Patient A had suffered psychological harm (which was supported by expert evidence). As set out above, the claimant declined to accept a caution and gave detailed reasons for doing so in a letter dated 12 January 2016. In essence, the claimant's position was that Patient A had not suffered psychological harm or that that such harm as she did suffer did not constitute actual bodily harm. Whilst no decision to charge the claimant was taken for another year, I infer that some of that time at least was taken up in considering the claimant's arguments, the expert evidence and the legal position.

26. In April 2017, the case was sent for trial in the Crown Court. On 23 December 2017, shortly before trial, two alternative counts of common assault were added to the indictment. The claimant then pleaded guilty to those two counts and no evidence was offered on the more serious counts of assault occasioning actual bodily harm.

27. The GMC became aware of the convictions and the "triage team" decided that the convictions met the threshold for investigation and sent the matter to the investigation team. That led to a letter dated 10 January 2018 from the GMC to the claimant sent under rule 4 informing him that the convictions were being treated as a new allegation not considered as part of the investigation into the events which had led to the issue of a warning in February 2017. Under the heading "What happens next", it was said that "When we have received all the information that we need, two case examiners, one lay and one medical, will decide what happens next" and the various options were set out. The letter was signed by Benjamin Hudson, an Investigation Officer. This new allegation was later referred to, and was referred to in these proceedings, as "the convictions allegation".

28. On 12 January 2018, the claimant was sentenced to a one year community order with an unpaid work requirement of 120 hours and he was fined £10,000.

29. By letter dated 14 March 2018, the GMC then notified the claimant of the decision of the Assistant Registrar under rule 12(2) to review the decision to issue a warning. This is the first decision which is the subject of this claim.

30. The reasons for this decision were, firstly, that the plain fact that there was now a conviction gave rise to a particular head of impairment. The Assistant Registrar observed that the Case Examiners had considered that violence was only "possibly apt" to describe the claimant's actions and that the new information of the convictions might have led to a different decision. The Assistant Registrar concluded that a review was not necessary for the public protection but that both the risk to public confidence and the risk of injustice to the claimant (under rule 12(3)) were engaged.

31. As to the risk to public confidence, the reasons given were:

*"I am mindful of the potential risk to public confidence in the profession and also in the GMC as a regulator, particularly given the conviction. I share the view of the Case Examiners that Mr Bramhall's conduct was such a departure from Good Medical Practice that it risks bringing the profession into disrepute."*

32. As to the risk of injustice to the claimant, the Assistant Registrar said:

*"I am also mindful that Mr Bramhall currently has an open investigation on the basis of this conviction. I am therefore of the view that a review is necessary to prevent the risk of injustice to Mr Bramhall. My reasoning for this is that it is likely Mr Bramhall has the, perfectly understandable, belief that this matter has been disposed of by the GMC given that he has received a Warning in relation these concerns. Given we are now investigating these same facts but on the basis that there has been a conviction, if Mr Bramhall is subsequently referred to an MPT, there is a risk that he will be sanctioned whilst still bound by the Warning for the same concerns."*

33. The "open investigation" referred to the process under rule 4 commenced by the letter of 10 January 2018. On this latter point of injustice to the claimant, therefore, the concern was that a new allegation in the form of the convictions allegation was now being considered and that that could result in the claimant being subject to two sanctions in respect of the same incidents. For that reason, it might, in any case, be necessary to review the warning that had already been given for the misconduct allegation. In her statement, Joanna Farrell, Assistant Director of Investigation, also explains that there was a concern that if the convictions allegation came before either the Case Examiners or the Medical Practitioners Tribunal, they might consider their discretion to be fettered by the existence of an outstanding warning.

34. RLB responded by letter dated 27 March 2018. In that letter, they said that they needed to clarify a number of matters before providing a substantive response and they asked a number of questions about the two allegations and their interrelationship. Question 1 was as follows:

*"Are the two convictions for common assault by beating from 13 December 2017 being dealt with as a separate GMC investigation at this stage and are we correct that they do not feature in the rule 12 review, save for the fact that they are considered to constitute relevant new information. If that is the case, could you please confirm the current status of the GMC's investigation into the convictions. A Rule 4 letter was sent to Mr Bramhall on 10 January, and neither we nor our client have heard further in that regard over the intervening two months ….."*

35. The GMC's response on 3 April 2018 was as follows:

*"There is an ongoing investigation in relation to Mr Bramhall's convictions for common assault. The convictions have not yet been considered by the Case Examiners; this will not be done until the Assistant Registrar at Rule 12 has decided whether a fresh decision in relation to the Warning is necessary at Rule 12(6). You will have noted from the decision at Rule 12(2) and (3) that the Assistant Registrar felt there was a risk of injustice to Mr Bramhall if the Warning were to stand and the Case Examiners considered the convictions separately given the convictions arose out of the same facts. There is a risk that the Warning could remain on Mr Bramhall's public record whilst the Case Examiners considered the distinct head of impairment arising from the conviction; effectively meaning Mr Bramhall could be sanctioned twice for the same events.*

*…*

*As part of their consideration, the Assistant Registrar will bear in mind all of the documents we hold in relation to the Warning decision and the investigation which led to that decision.*

*If the Assistant Registrar determines that a fresh decision is necessary, it will be a matter for the Case Examiners to determine whether these allegations should be linked to the ongoing convictions investigation or whether they are closed down and the conviction case now runs in isolation."*

36. RLB responded on 9 April 2018 with further (and to some extent repetitious) questions. In particular, they asked whether, if the Case Examiners considered the convictions allegation in isolation or together with the misconduct allegation referred back to them, the GMC would object to the claimant referring to the representations previously made on the misconduct allegation and the disposal of that allegation. RLB added:

*"I fully accept that irrespective of your response to the above questions, it would be a matter for the Case Examiners to accept or reject submissions based on previous disposal and/or to determine what weight should be attached to that previous disposal."*

37. The GMC replied by letter dated 10 April 2018 as follows;

*"In terms of any representations you wish to make on Mr Bramhall's behalf, the contents of those are a matter for you. However, if the Assistant Registrar determines that the decision to issue a Warning in the misconduct case should be referred back to the Case Examiners for a fresh decision our position would be that the decision of 9 February 2017 is now irrelevant. At the time the decision was made, the Case Examiners were unaware of the conviction. This is the central issue of the review. The Assistant Registrar is currently of the view, subject to comments received during this process, that had the Case Examiners been aware of the conviction, they may have reached a different decision.*

*If the original misconduct decision to issue a Warning stands, the Case Examiners will be aware of that when they consider the conviction case and there is nothing to prevent the Case Examiners issuing a Warning in respect of the convictions if they chose to do so. This is the other focus of the Rule 12 review; the Assistant Registrar is conscious that, as matters stand, there is a potential that Mr Bramhall could receive an additional sanction for facts which have already been considered by the GMC."*

38. By letter dated 30 April 2018, RLB, on behalf of the claimant, then made representations under rule 12(5). The representations were again lengthy. The factual background was set out. It was argued that the new information was not truly novel and would not probably have altered the Case Examiners' decision. The position that a review was necessary to prevent injustice to the claimant was described as "artificial" because, even if the original decision was reviewed and quashed and he received a fresh sanction, he would have been sanctioned twice. As to the public interest, it was argued that the position was unique because the misconduct and the convictions were founded on precisely the same facts: the ordinary and reasonable member of the public would not expect the decision to issue a warning to be revisited and would regard such action as oppressive and excessive.

39. Nonetheless, the Assistant Registrar decided to refer the misconduct allegation back to the Case Examiners under rule 12(6)(b) and the claimant was so notified by letter dated 6 June 2018. This is the second decision challenged.

40. The reasons were again set out in an Annex:

    (i) The Assistant Registrar considered that there was new information because, at the time of the Case Examiners' consideration, there had been no conviction. Bearing in mind that the default position under rule 5 was that matters for which a practitioner received a conviction would be referred to the Medical Practitioners Tribunal, this new information would probably have led to a different conclusion:

    *"I have taken into account the comments made on Mr Bramhall's behalf that the Case Examiners were aware a conviction would arise. However, the fact remains that Mr Bramhall had not been convicted at the time the Case Examiners reached their decision. I remain of the view that had Mr Bramhall been convicted at the time, the Case Examiners would likely have referred the matter to a Tribunal, under the distinct head of impairment."*

    (ii) As to the risk of injustice to the claimant, the Assistant Registrar said:

    *"… I remain of the view that the only mechanism available to us to remedy the risk of two sanctions running concurrently arising from the same events is for this matter to be referred back to the Case Examiners for a fresh decision."*

    (iii) As to the public interest, the reasons again focussed on the fact that the public interest includes public confidence in the medical profession, echoing the GMC's statutory purpose, and that "Mr Bramhall's conduct was such a departure from Good Medical Practice that it risks bringing the profession into disrepute."

41. Despite the attention that had been given to this matter, the misconduct allegation does not, at this point, appear to have been referred back to the Case Examiners.

42. On 14 June 2018, the rule 11(2) warning was removed from the claimant's GMC record. That appears to have been an error.

43. On or about 29 June 2018, an Investigation Officer then asked an Assistant Registrar to decide under rule 5(2) whether the convictions allegation should be referred directly to the Medical Practitioners Tribunal or to the Case Examiners under rule 8. There was also a request for a "similar decision" in relation to the misconduct allegation. That is agreed to have been an error, since a decision had already been taken to refer the misconduct allegation back to the Case Examiners, and the Registrar, in any case, had

no power to refer that allegation to a Medical Practitioners Tribunal. Although the claimant appears to rely on this error, nothing, in my view, turns on it since it was not acted upon.

44. On 4 July 2018, an Investigation Officer, Jackie Uppal, sent a further letter by email to the claimant and his solicitors. The e-mail said that it attached correspondence advising that an Assistant Registrar had decided to refer the two open cases, namely "the criminal conviction and the misconduct matter reopened under r12" to a fitness to practise hearing. That was also patently in error as the misconduct allegation was, in accordance with the first and second decisions, to be referred back to the Case Examiners for their decision. The attached letter, however, accurately stated that the Assistant Registrar had decided to make a referral to a Medical Practitioners Tribunal under rule 5(2). That decision was, therefore, taken as a result of the new convictions allegation and was the outcome of the process started by the letter of 10 January 2018. This is the third decision challenged.

45. Reasons were not annexed to this letter. In the course of pre-action correspondence, the GMC made reference to reasons and, at the claimant's request, the relevant internal document was produced. This was a short document of a little over a page. It set out the factual background including the fact that the Registrar had initiated a rule 12 review which, it was said, was to ensure that the claimant was not at risk of receiving a warning and a sanction from the Medical Practitioners Tribunal "for the same facts". The reasons then recited rule 5(2) and, under the heading "Assistant Registrar Consideration" concluded:

*"This matter has been under investigation by both us and the Police for a very long time and it is my opinion that it is in the interests of fairness to the doctor that the conviction is referred directly to an MPT now by me as an assistant registrar to avoid further delay."*

46. The claimant was then notified of a hearing before the Medical Practitioners Tribunal on 15 October 2018.

47. That led to the sending of a letter of claim dated 9 August 2018. It will be apparent from the lengthy chronology above that at this point there was no published decision of the Case Examiners following the referral back to them under rule 12. Ms Farrell explained in her statement that the GMC then realised that the misconduct allegation had not, in fact, been referred back to the Case Examiners in accordance with the second decision. That was then done. The GMC responded to the letter of claim by letter dated 29 August 2018 and enclosed with that letter the Case Examiners' decision, dated 24 August 2018, under the rule 12 procedure. That decision was to take no further action. The following reasons were given:

*"…We agree that the criminal conviction in respect of these matters raises further public confidence concerns and that the Assistant Registrar has appropriately referred this matter for consideration by a Medical Practitioners Tribunal.*

*We now address the original allegation of misconduct considered by the case examiners in February 2017. In our view, as this relates to the same facts, and will now be considered by a Medical Practitioners Tribunal, it would be unjust for the case examiners to consider any separate action in respect of these matters. We note that the previously issued warning has been removed from Mr Bramhall's records and that the circumstances now relating to the previous warning (which related to the original*

*allegation of misconduct) will now be properly considered by a Medical Practitioners Tribunal when determining what, if any action, to take in respect of the conviction."*

48. Although not entirely clear, this appears, therefore, to have been a procedural rather than a substantive decision in the light of the "convictions allegation" which by this time was proceeding by way of reference to the Medical Practitioners Tribunal. The Case Examiners did, however, express their agreement with the Assistant Registrar's decision to refer the convictions allegation to the Tribunal under rule 5(2). In any event, there is no separate challenge to this decision. The decision to take no further action had the effect that, the warning having removed from the claimant's record, it was not restored.

49. By the end of August 2018, the position was in summary that:

    (i) the convictions allegation had, uncontroversially, been treated as a new allegation and a decision taken under rule 5(2) to refer the allegation directly to the Medical Practitioners Tribunal and not to the Case Examiners under rule 8; and

    (ii) the warning in respect of the original misconduct allegation had been removed from the record (albeit erroneously) and not restored as a result of the review under rule 12. No further action was to be taken.

***The Claimant's case***

50. The claimant challenges and seeks (i) to set aside all three decisions and (ii) to be returned to the position he was in in before any decisions were taken in relation to the convictions allegation. At that point the decision under rule 5(2) would then have to be taken again.

51. The claimant's contention is that, properly taken, that decision would or might be different such that the convictions allegation would be referred to the Case Examiners under rule 8 and not directly to the Medical Practitioners Tribunal. That argument is advanced on the basis that the decision under rule 5(2) would be taken against the background that the Case Examiners had already disposed of the misconduct allegation arising out of the same facts by the sanction of a warning and that there was an extant and published warning on the claimant's record.

52. Further, and again against the background of that warning, the Case Examiners would or might determine that the allegations were not properly to be referred to the Medical Practitioners Tribunal. In support of that submission, Mr Holl-Allen QC relies on the fact that the decision making process of the Case Examiners is different from that under rule 5(2) because the test to be applied by the Case Examiners is that of a realistic prospect of a finding by the Medical Practitioners Tribunal of current impairment of fitness to practise.

53. Mr Holl-Allen QC submitted that the procedural sequence of events was flawed. No decision, he submitted, ought to have been taken in respect of referral back to the Case Examiners under rule 12 until a decision had been taken under rule 5(2). As I understand it, that is the consequence of, or another way of putting, the argument that the decision under rule 5(2) ought to have been taken against the background of, and with the benefit of, the extant sanction of a warning.

54. As I have indicated above, the purpose of this challenge, therefore, seems to be to achieve a position in which the original warning still stands (or at least is thought to

still stand) so that it becomes relevant to the decision under rule 5(2). Mr Holl-Allen QC did not go so far as to argue that not to refer the convictions allegation to the Case Examiners under rule 5(2) was unlawful. Rather, he said that the GMC had led itself into error in that the Assistant Registrar failed to take into account in the rule 12 procedure the fact that no decision had been taken on the convictions allegation. If he had done so, the misconduct allegation would not have been referred back until a decision had been taken under rule 5(2) and that decision would then have been taken against the background of the subsisting warning. It seems to me that inherent in that argument is the assumption not simply of a particular sequence of proceeding that ought to have been followed but also that, once the Case Examiners have considered a misconduct allegation, any further allegation arising out of the same or similar facts should be referred back to them. There is nothing in the rules that says so or that points that way. On the contrary, it would have the effect of reversing the "presumption" in rule 5(2).

55. For the GMC, Mr Mant submits that the argument in respect of the first and second decisions is completely academic because the outcome of the referral back to the Case Examiners was that the warning was removed and no further action taken. That was the best possible outcome for the claimant and, in any event, the Case Examiners' decision to take no further action is not itself challenged. The best possible outcome argument would arise in any case because the warning was removed but it was particularly pertinent in this case because the GMC's "Publication and disclosure" policy changed in February 2018. Warnings issued before that date were published on the doctor's record for five years but the total period of such publication has now been reduced to two years. Thus, even if a further warning were to be issued, and taking into account the period of publication from February 2017, the warning would still be published for a shorter time than was originally the case.

56. In my judgment, Mr Mant is right in his submission that the claims to quash the first and second decisions are academic, irrespective of the basis on which those decisions were taken. That is so for a number of reasons.

57. Firstly, as will be apparent from the chronology set out above, the decision under rule 5(2) to refer the convictions allegation directly to the Medical Practitioners Tribunal was, in fact, taken before any decision was taken by the Case Examiners to whom the original misconduct allegation had been referred back under rule 12. It is also the fact that the warning had been removed by administrative error but no decision to this effect had been taken by the Case Examiners. Therefore, the order of events which Mr Holl-Allen QC submits should have occurred did, on the facts, occur.

58. Secondly, even if the rule 5(2) decision is properly to be regarded as taken after a decision to remove the warning, there can be no question that the warning that had been issued and the disposal that had been thought fit by the Case Examiners was known to the Assistant Registrar. Its significance, if any, is in the disposal thought fit by the Case Examiners on an allegation arising out of the same facts as the convictions allegation. I cannot see why it could make any material difference that that warning was not published at the time the decision was taken.

59. Thirdly, the position here, in any event, is that a new allegation arose from the criminal convictions and the "presumption" in rule 5(2) is that that allegation will be referred directly to the Medical Practitioners Tribunal unless the Registrar is of the opinion that it ought to be referred to the Case Examiners. Reference to the Medical Practitioners

Tribunal is the default position and what the Registrar is required to do, and the only opinion he is required to form is as to whether to depart from that default position. Where, as here, there are now criminal convictions, there is no logical or compelling reason why the matter should be referred to the Case Examiners under rule 8 simply because they had previously issued a warning at a time when there were no criminal convictions.

60. Further, the GMC's published guidance, set out in paragraph 11 above, indicates the circumstances in which the exception will apply and these are limited to minor offences and ones committed outside the professional context. I note that Mr Holl-Allen QC argued, relying on paragraph 7 of Annex D, that, taking account of the criteria there identified, this was very much a case in which the Registrar would form the view or ought to form the view that the convictions should be referred to the Case Examiners. But that seems to me to ignore the Guidance on warnings and, indeed, the further examples in Annex D. All of the offences given specific consideration are ones that occur outside of the conduct of the doctor's professional practice.

61. Thus, even if there was anything in the procedural complaints about this decision-making process, I cannot see how it would have made any difference to the outcome of the process under rule 5(2).

62. The fact that the challenge to the first and second decisions is academic is itself a sufficient reason to refuse to quash the decisions.

*The complaints about the first and second decisions*

63. In any event, I do not consider that there are any grounds on which either of these decisions could be regarded as irrational.

64. So far as the first decision is concerned, the first element of the decision to review is that there must be new information which may have led to a different decision. The convictions are such new information. Firstly, it seems to me that the fact of a criminal conviction which had not been received at the time of the Case Examiners consideration is in itself new information. Although the point had been taken in correspondence that the convictions were not truly new information, it was accepted by the claimant that the convictions were new information that may have led to a different decision.

65. That concession was, in my view, rightly made. Whilst the facts underlying the criminal convictions are largely the same as those relied on in the misconduct allegation, the claimant's guilty plea to the count arising out of the February 2013 incident was the first time he had unequivocally admitted that act. Secondly, and as the Assistant Registrar said, at the time the Case Examiners considered the matter, there was no criminal conviction at all. They did not know whether the misconduct allegation amounted to a criminal offence or offences and the claimant was insistent that criminal proceedings were highly unlikely. Although I accept that the main plank of the claimant's representations was that there was no harm that could give rise to the offence of assault occasioning actual bodily harm, there was never any indication in the documents before the Case Examiners that he accepted that he had committed the offence (or offences) of common assault and would have pleaded guilty to such charges. Had there been a conviction, that would have been a potential ground of impairment under s. 35C(2) and there is a presumption under rule 5(2) that the allegation would be referred directly to the Medical Practitioners Tribunal. These were

all matters that the Case Examiners had not been in a position to take into account and it was entirely rational for the Assistant Registrar to conclude that, had they taken them into account, that may have led to a different decision.

66. The second requirement is that one of the tests of necessity in rule 12(3)(a) to (c) must be met. Both the first and second decisions focus on the public interest and the interest in public confidence in the profession, reflecting the GMC's statutory purpose. The decision that referral back to the Case Examiners was necessary because of the risk to public confidence in the profession was again, in my view, entirely rational. Mr Holl-Allen QC emphasised that the test was one of necessity not desirability. Whatever the GMC may previously have regarded as the appropriate sanction, the position now is that the claimant has two criminal convictions for offences of assault on his patients committed in the exercise of his professional duties. No member of the public would be surprised to find that the sanction imposed on the claimant was being reconsidered in the light of those convictions and what they might disclose about his attitude towards his patients and it might be thought that most members of the public would expect such reconsideration. It seems obvious that, following the convictions, public confidence in the profession would be in issue and potentially undermined by the fact that the claimant had received only a warning at a time when he had not been convicted, and the public would expect review following these events. I can see nothing irrational in the Assistant Registrar reaching the conclusion that the test of necessity was met.

67. The decision was also taken on the basis that it was necessary in the claimant's interests since he might otherwise be the subject of a Medical Practitioners Tribunal hearing at the same time the warning remained in place. That reasoning was based on the premise that the claimant had "an open investigation" on the basis of the convictions. At the time the first decision was taken, however, the rule 5(2) process had not progressed and no decision as to what to do under this rule had been taken. The reasoning was, therefore, less persuasive but it was not irrational. The Assistant Registrar sought to avoid the risk of the imposition of more than one and inconsistent sanctions and recognised that the presumption under rule 5(2) was that there would be a direct reference to the Medical Practitioners Tribunal. It cannot be said that, in considering the risk of injustice, the Assistant Registrar applied the wrong test. Mr Holl-Allen QC submitted that the test was not one of preventing the risk of injustice but of preventing injustice. That is a semantic distinction which misses the point that one prevents injustice by avoiding the risk of it. In any case, reliance on this limb of rule 12(3) is immaterial because there was a firm alternative basis for the decision.

68. The second decision is the decision to refer the misconduct allegation for reconsideration under rule 12(6)(b). This is the second stage of the procedure under rule 12 but involves the same considerations as in respect of review, except that the Registrar must be of the view that the new information would probably have led to a different decision. The claimant complains that the Assistant Registrar made no attempt to grapple with the question of whether the convictions would have made any difference to the Case Examiners. But the reasons of 6 June 2018 clearly show that the Assistant Registrar took the view that the convictions would probably have made a difference because the Case Examiners would have been likely to refer the matter to a tribunal "under the distinct head of impairment". In any event, I repeat what I said in paragraph 65 above.

69. Mr Holl-Allen QC also submitted that there was a procedural error in the referral back to the Case Examiners. As mentioned above, since that was a referral under rule 8, he

argued that the provisions of rule 7 applied and the claimant ought to have been given an opportunity to make representations under rule 7 before the Case Examiners reached any decision. However, this point was first raised not in the claimant's grounds but in Mr Holl-Allen's skeleton argument. That is consistent with the fact that there was no challenge to the decision of the Case Examiners to take no further action. It follows from the absence of any such challenge that, although there was in his submissions a procedural error, it had no consequences. In my view, as a matter of construction of the rules, Mr Holl-Allen QC's submission was correct but, since it had no consequence in this case, it was not fully argued on behalf of the defendant and, as I have said, it is unnecessary for me to decide the point. In any event, by the time the Case Examiners' decision was taken, the claimant had had ample opportunity to make representations and had taken that opportunity at some length. Although those representations were made in respect of the Registrar's decision to refer the misconduct allegation back to the Case Examiners under rule 12 rather than the subsequent consideration by the Case Examiners under rule 8, it is, to my mind, wholly artificial to ignore the representations already made as part of the same process. That is particularly so when the representations addressed all the issues that would have been before the Case Examiners on re-consideration, including the procedural basis on which the Case Examiners appear to have reached their decision. It follows that any procedural error is irrelevant.

*The third decision*

70. The third decision is the decision to refer the "convictions allegation" directly to the Medical Practitioners Tribunal under rule 5(2). The challenge to that decision is the real heart of the claimant's claim. It is, in my view, fair to say that the 4 July 2018 letter and the reasons later provided give little indication of the basis for this decision and are short on reasoning. Firstly, however, there is, under the rules, no duty to give reasons for the decision to refer the allegation directly to the Medical Practitioners Tribunal. That is in contrast to the position under rule 8(4) where the case examiners take such a decision and reasons are expressly required. That contrast reflects the fact that the presumption under rule 5(2) is that the allegation will be referred to the Medical Practitioners Tribunal. Further, the letter and the reasons taken together do make reference to rule 5(2); state that "a hearing is required as the allegations under investigation relate to a conviction that merits consideration at tribunal"; and state that the Assistant Registrar has had regard to fairness to the claimant. These statements, by necessary implication, demonstrate that the Assistant Registrar had considered the alternative of a referral under Rule 8 but was not of the opinion that that was the course he should take. That, as I have said, is the only opinion he is required to form under rule 5(2).

71. The claimant's case is that that decision was flawed on six grounds set out in the Statement of Facts and Grounds. They are free standing matters and do not turn on this court's decision on the first and second decisions.

72. Firstly, it is submitted that the decision to refer directly to the Medical Practitioners Tribunal was contrary to the claimant's legitimate expectation following the letter of 10 January 2018 which stated that the convictions allegation would be referred to the Case Examiners under rule 8. That is an optimistic submission about what is obviously a standard form letter signed by an Investigation Officer. The letter does indicate that the next step will be reference to two Case Examiners who will decide what happens next. That, however, is only one course open to the Registrar and that itself is clear from the

rules and, in particular, rule 5. It cannot sensibly be argued that this letter could have created a legitimate expectation that the Registrar had already taken a decision under rule 5 to proceed under rule 8. Indeed, the Registrar could not have done so because, at the date of this letter, the claimant had not been sentenced and neither he nor the GMC knew whether rule 5(1) or (2) applied.

73. In RLB's letter dated 27 March 2018, the solicitors asked whether the convictions were being dealt with by a separate investigation and asked for confirmation of the status of that investigation. That makes it clear that the claimant did not regard the letter of 10 January as committing the GMC to any particular course of action and did not have any legitimate expectation of any particular course of action. Further making good the point that the claimant was aware of the available options, the letter continues:

*"A rule 4 letter was sent to Mr Bramhall on 10 January, and neither we nor our client have heard further in that regard over the intervening two months. It is of critical importance for Mr Bramhall to know whether those convictions are to be referred direct to the Medical Practitioners Tribunal Service (which would be excessive in the circumstances), or referred to the Case Examiners, under Rule 5(2). Until confirmation is received in this regard his ability to make an informed response to the rule 12 review is seriously undermined."*

74. In his argument, Mr Holl-Allen QC also relied on statements made in the GMC's letters dated 3 April 2018 and 10 April 2018:

(i) The letter dated 3 April 2018 simply says that the convictions have not yet been considered by the Case Examiners. The letter was sent in response to RLB's letter of 27 March 2018 and, in answer to the questions about the status of the investigation, explains that the convictions will not be considered by the Case Examiners until the Assistant Registrar has decided whether the refer the matter back to them under rule 12. The references to referral of the convictions allegation to the Case Examiners reflect the context of the correspondence and there is no representation as to what <u>will</u> be done under rule 5.

(ii) The letter dated 10 April 2018 is concerned with what will happen if the matter is referred back to the Case Examiners.

75. Neither of these letters could give rise to any legitimate expectation as to the course the Registrar would take under rule 5(2).

76. The second alleged flaw is that the Assistant Registrar did not consider the exercise of his discretion under rule 5(2) to refer the convictions under rule 8. In particular, it is submitted that merely reciting rule 5(2) is not enough. I have already addressed this argument above. At the risk of repetition, the discretion is not a fully open one. There is a presumption of referral to the MPTS (for referral to the Medical Practitioners Tribunal) unless the Registrar considers that there ought to be a referral to the Case Examiners under rule 8. The Registrar was clearly aware of that and it seems to me that a fair reading of the reasons given, however shortly stated, is that he was not of the opinion that referral under rule 8 was appropriate.

77. The third submission is that the Assistant Registrar did not have regard to the fact that the misconduct allegation had been referred to the Case Examiners for reconsideration. The reasons make it clear that he was aware of the two open cases which are set out in the case summary and the Assistant Registrar records that the rule 12 review was

requested so that there was no risk of the doctor receiving both a warning and a possible MPT sanction. He, therefore, had in mind that the reconsideration might result in the removal of the warning. I cannot see why that should have affected his decision but, in any case, it was taken into account.

78. Next and fourthly, it is submitted that the Assistant Registrar decided that fairness to the claimant required referral to the Medical Practitioners Tribunal to avoid further delay but did not have regard to the unfairness of a referral without the opportunity to make written representations to the Case Examiners as to why that was, in fact, unnecessary. This submission is a variation on the theme that the decision under rule 5(2) to refer the convictions allegation directly to the Medical Practitioners Tribunal was procedurally flawed and/or irrational. Under rule 5(2), there is no entitlement of the practitioner to make representations but the opportunity to make representations in accordance with the rules would arise if there was a referral to the Case Examiners under rule 8. In other words, the argument assumes that the Assistant Registrar's decision ought to have been to refer the convictions allegation to the Case Examiners. For all the reasons I have already given, adopting the default position under rule 5(2) was not procedurally flawed and could not be an irrational decision.

79. Fifthly, the claimant submits that, by deciding to refer the convictions allegation directly to the Medical Practitioners Tribunal, the Assistant Registrar fettered the discretion of the Case Examiners when reconsidering the misconduct allegation. I regard that submission as unsustainable. The decision of the Assistant Registrar under rule 5(2) did not have the effect of requiring the Case Examiners to take any particular course of action on reconsideration of the misconduct allegation. It seems to me that this submission is a further attempt to reformulate the claimant's case that the decision the Assistant Registrar ought to have taken was to refer the convictions allegation to the Case Examiners under rule 5(2).

80. Lastly, it is argued that the Assistant Registrar gave insufficient reasons for his decision to refer directly to the Medical Practitioners Tribunal. That contention has to be seen both in the context of the default position under rule 5(2) and the absence of any express duty to give reasons. Only if the Registrar formed the view that this was a case within the exception would he not refer the allegation directly to the Medical Practitioners Tribunal. That does not require the setting out of reasons for taking the decision to make that direct referral. As I have said in paragraph 70 above, the reasons given are brief but, in the context of the rules, the absence of further reasoning is not a ground for challenge. The Assistant Registrar has adopted the default position and there is no question of there being inadequate reasons for the claimant to understand why he has done so.

81. The challenges to all three decisions fail and I would not quash these decisions.

**Lord Justice Holroyde:**

82. I am grateful to my Lady, Jefford J, for her thorough and detailed judgment. I agree with her reasoning and conclusions, and there is nothing I would wish to add. It follows that this claim for judicial review fails and is dismissed.