Neutral Citation Number: [2025] EWHC 397 (Admin)

Case No: AC-2024-BHM-000167

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

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 25th February 2025

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

ANDREW BRUCE

Appellant

- and -

SECRETARY OF STATE FOR EDUCATION

Respondent

- -

Andrew Faux (instructed by **The Reflective Practice**) for the **Appellant**
Simon Pritchard (instructed by and for) the **Respondent**

Hearing date: 3rd February 2025

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JUDGMENT

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ TINDAL:

Introduction

1. This is a statutory appeal by a teacher from a Prohibition Order by the Department of Education permanently banning them from teaching. This followed a finding by its Professional Conduct Panel ('PCP') that the teacher engaged in inappropriate sexual behaviour towards some pupils. It considers the High Court's approach to 'rehearing-type appeals' in such cases; as well as the relevance of principles of evidential and procedural fairness from the Criminal Courts for PCPs on issues such as: the admissibility of prejudicial hearsay evidence; 'bad character' and 'good character' evidence; and the extent to which the PCP has an 'inquisitorial' function.

2. Andrew Bruce ('the Appellant' as I will call him), a retired teacher, appeals from the decision of Department of Education ('the Respondent') of 9th May 2024 prohibiting him from teaching permanently. This followed the PCP's decision of 3rd May 2024 that he engaged in this professional misconduct towards pupils (whose names were anonymised before the PCP and remain so before the High Court):

    (a) In or around June-July 2015, by entering and/or remaining in the bathroom whilst Pupil A was showering;

    (b) In or around June-July 2016, by:

        i. entering Pupil A and B's hotel room and asking Pupil A and/or B to remove their towels;

        ii. telling Pupil A and/or B to face him and/or turn around or words to that effect whilst he was naked or only wearing underwear; and

        iii. lifting Pupil A's towel away from his body whilst he was drying, exposing his naked lower body.

    (d) In or around Easter 2004 by:

        i. asking Pupil D to remove his clothes after he had wet the bed;

        ii. using his hand to rub and/or apply lotion and/or soap to Pupil D's body and/or genitals;

        iii. pulling back the shower curtain and looking at Pupil D whilst showering.

    The PCP found (in allegation 3, but it was a separate inference) that was sexually-motivated and/or conduct of a sexual nature. Other allegations were dismissed (including that the Appellant had been warned about similar conduct in 1990, which was allegation 2).

3. On 7th June 2024, the Appellant filed his appeal, which set out effectively 15 grounds of appeal, albeit there is considerable overlap between them. The last ground is a complaint that the Respondent's own decision-maker was wrong to impose a Prohibition Order because the PCP were wrong to find the allegations proved. However, Mr Faux for the Appellant accepted that ground stood or fell with his overarching procedural unfairness ground of appeal that the Respondent was *'wrong to impose a prohibition because of serious procedural irregularities in the*

process followed by the PCP', namely the following 14 sub-grounds of appeal (which both Mr Faux and Mr Pritchard for the Respondent addressed individually):

(a) The Respondent's prosecuting authority prepared a bundle containing (and the Panel allowed them to rely on) material which should not have been admitted as its admission was neither fair nor relevant, namely: (i) opinion evidence; (ii) allegations of misconduct not pleaded against the Appellant; (iii) repetitive hearsay evidence in the form of police logs; and (iv) hearsay evidence on past advice given to the Appellant. (As (i) was not pursued and (ii) involves hearsay evidence I will call (a) the 'prejudicial hearsay ground'. It arises from the allegation the PCP dismissed about the 1990 'warning').

(b) The Panel hearing proceeded as an online hearing when a case such as this, with the gravest reputational issues at stake, merited an in-person hearing so the Panel could meet with and properly assess the Appellant.

(c) The Panel accepted into evidence an ABE interview of one complainant without playing the same during the proceedings.

(d) The Panel failed to adopt an inquisitorial approach and did not explore aspects of the teacher's evidence to establish the nature of his work as a boarding master and the requirement, throughout his career, to supervise children washing, including presence when they were in a state of undress.

(e) The PCP failed to adopt an inquisitorial approach and did not inquire into the teacher's wider personal life, insofar as that was relevant to the allegation that he was sexually attracted to young children.

(f) The Panel failed to adopt an inquisitorial approach and did not, upon learning of Pupil D's assertion that he was under treatment for 'false memory syndrome', seek out medical evidence, the disclosure of which may have assisted their inquiry.

(g) In any event, the Panel failed to account for, or take sufficient account, of Pupil D's description of being under treatment for false memory syndrome.

(h) The Panel took no, or no sufficient, account of the Appellant's good character.

(i) The Panel took no, or no sufficient account, of the results of police examination of the Appellant's electronic devices.

(j) The Panel took no, or no sufficient account, of positive testimonial evidence.

(k) The Panel took no account of the inherent unlikeliness of a heterosexual teacher of good character acting in a sexual manner towards male children when considering whether the standard of proof had been met.

(l) Having found proved the allegations of physical contact in the context of providing care for children who had wet their bed or who were required to remove excess sand from their bodies following a trip to a beach, the Panel inferred sexual motive with no proper consideration of the possible alternatives.

(m) The PCP wholly failed to give adequate explanation as to: i) how it arrived at its conclusions on the facts; ii) how the standard and burden of proof was applied; iii) how sexual motive was inferred from the facts it found proved.

(n) The Panel failed to take proper account of the delay, in part occasioned by the slowness of the TRA's processes.

4. Those fourteen separate grounds are most helpfully considered in three groups relating to: first, hearsay evidence linked to allegation 2; then to the PCP's findings of fact in allegation 1; and finally to its conclusion of sexual motive in allegation 3:

   (1) Firstly, Ground 1(a) (i.e. the 'prejudicial hearsay ground'), 1(b) and 1(c) allege 'pure' procedural unfairness in the sense they do not attack the *reasoning* of the PCP as such but how it conducted the hearing and what evidence it permitted. However, Mr Faux did not really pursue 1(b) and 1(c). On 1(b), Mr Pritchard pointed out that online hearings are the 'default position' in PCPs, but that teachers could request an in-person hearing, which the Appellant did not do. I will return to this briefly, but Mr Pritchard is right to say the appropriateness of online hearings in cases of this kind is best considered by the High Court in a case where a teacher has been *refused* an in-person hearing. Likewise, Mr Faux did not push 1(c), since as Mr Pritchard pointed out, the PCP had watched the ABE interview before the hearing and no request for Pupil D to watch it was made by the Appellant, or his appointed-advocate. (Nor in my experience of the Crown Court would it be typical for a witness – as opposed to a Jury – to watch their ABE interview during the trial in Court). But Mr Faux not only pursued Ground 1(a) the 'prejudicial hearsay ground' - as a complaint of *wrongful admission* of hearsay evidence; he also suggested Grounds 1(d)-(n) showed it had *consequentially prejudiced* the PCP's findings of fact on allegations 1a-d.

   (2) Secondly, Mr Faux submitted Grounds 1(d)-(n) (save (l)) also quite separately showed the PCP had erred in its approach to its findings of fact on allegations 1a-d in: not acting 'inquisitorially' by not investigating or recognising (1) the Appellant's good character (Grounds 1(d), (e), (h), (i), (j) and (k)); or (2) points undermining the evidence of Pupil D (Grounds 1(f)/(g)) or giving inadequate reasons for accepting his evidence and that of Pupils A and B (Ground 1(m)(i)); and (3) not taking account of impact of delay on all the witnesses (Ground 1(n)).

   (3) Thirdly, I prefer to separate out Grounds 1(l) and (m)(iii) relating to allegation 3: the PCP's inference of sexual motive, which is also linked to its finding of unacceptable professional misconduct and recommendation of prohibition order. This raises rather different issues than about the PCP's findings of fact.

5. Mr Pritchard complained these were entirely new grounds of appeal; and whilst that rather over-states the position, Mr Faux himself accepted that the focus of the appeal had changed. However, it is only the multiple dimensions of the grounds of appeal that is new: principally 'extending' Ground 1(a) by 'dual-use' of Grounds 1(d)-(n) to allege *consequential prejudice* in those respects from the hearsay evidence on the PCP's findings of fact on allegations 1a-d, when only the *admission* of that hearsay evidence is challenged in the pleaded Ground 1(a). In fairness to Mr Pritchard, this was not the way Mr Faux articulated the grounds of appeal before me at the preliminary hearing on 13th September 2024. However, at that hearing (listed by HHJ Wall on 18th July 2024 who also ordered that Appellant should have costs protection should he lose the appeal), I decided the appeal should be a 'rehearing' rather than a 'review'. One feature of a 'rehearing-type appeal' in a professional regulatory case is greater flexibility with the grounds of appeal - as illustrated by *El-Karout v Nursing and Midwifery Council* [2019] EWHC 28 (Admin), where

Spencer J allowed an appeal on a ground – indeed related like Ground 1(a) here to hearsay evidence - that he raised himself on behalf of an appellant-in-person. Therefore, I permitted the new way of putting the case to be pursued on this appeal.

'Rehearing-type Appeals' in the Teaching and other Professional Contexts

6. The leading case on whether appeals by teachers from the Respondent should be a 'review' or 'rehearing' is now *Ullmer v SSE* [2021] EWHC 1366 (Admin), where Steyn J set out the legal framework in detail at [12]-[23], so I need only summarise it. The Education Act 2002 ('EA 2002') as amended by the Education Act 2011 vests regulatory decisions in the Respondent Secretary of State (or in practice under the *Carltona* principle, officials in their department). ss.141B and 141C, along with Schedule 11A EA 2002, require the Respondent to investigate allegations referred to it of unacceptable professional conduct by teachers and to decide whether to prohibit them from teaching. Regulations under Sch.11A require the Respondent to notify and allow the teacher to respond to the allegation and then decide whether it should be dismissed or considered by a professional conduct panel ('PCP'). PCPs then adjudicate the allegation at a hearing and if upholding it, must recommend to the Respondent whether to make a prohibition order. This order prohibits the teacher from teaching indefinitely, but with a minimum term for the teacher to apply for a review which must be at least two years but which may (as here) be permanent.

7. If the Respondent does make a prohibition order, the teacher can appeal it within 28 days *to* the High Court under para.5 Sch.11A EA 2002, but there is no further right of appeal *from* the High Court: p.5(3). As Steyn J also explained in *Ullmer*, the appeal is governed by Civil Procedure Rule ('CPR') 52 and CPR 52.21 states:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless – (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
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> (2) Unless it orders otherwise, the appeal court will not receive (a) oral evidence; or (b) evidence which was not before the lower court.
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> (3) The appeal court will allow an appeal where the decision of the lower court was - (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
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> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
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> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

As Steyn J noted in *Ullmer* at [23], whilst Practice Direction 52D lists statutory appeals from other professional regulatory bodies requiring rehearing (including doctors from the General Medical Council), teacher appeals from the Respondent are not included. Steyn J accepted PCP proceedings engage 'civil rights' under Art.6 ECHR (but as the PCP forms its own view, an employer's internal process generally does not engage Art.6: *R(G) v X School* [2011] 3 WLR 237 (SC)). But Steyn J held at [71]-[77] of *Ullmer* that did not itself mandate a rehearing, as

'prosecution' of allegations by the Respondent's 'Teaching Regulation Agency' ('TRA') was separate from the PCP's adjudication of it. Indeed, Steyn J in *Ullmer* concluded at [69]-[70] that the 'default position' for teacher appeals was a review-type appeal unless 'the interests of justice' required a rehearing-type appeal.

8. In short, at the preliminary hearing in this case on 13th September 2024, I decided that the 'interests of justice' did require a rehearing-type appeal for similar reasons as Steyn J decided that was warranted in *Ullmer*. Like that case, the present case is an allegation of a sexual misconduct towards a pupil by a teacher which has the effect of preventing the Appellant ever teaching again. Also like *Ullmer*, there is an allegation here that proceedings before the PCP were procedurally unfair. However, the decision a rehearing-type appeal is in the interests of justice in this case begs the question of the difference between 'review' and 'rehearing' appeals. In *Ullmer*, Steyn J considered the Court of Appeal's analysis of rehearing-type appeals by doctors (by right) in *Sastry v GMC* [2021] 1 WLR 5029 and observed:

> "83…..[E]ven where PD 52D requires an appeal by way of rehearing from decisions of professional regulatory bodies, such appeals are not conducted as rehearings in the full sense. Permission is required to adduce any evidence that was not before the lower tribunal and save in exceptional cases the court will not hear oral evidence. The question for the court, whether the appeal is by way of rehearing or review, is whether the decision under appeal is wrong or unjust. The bounds of either form of appeal are defined by the grounds of appeal (CPR 52.21(5)). And the court will accord appropriate respect to the primary findings of fact made by the first instance tribunal which heard the witnesses give evidence. So, in the context of this case, the distinction between an appeal by way of rehearing or by way of review is a fine one…..
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> 84….Nevertheless, *Sastry* makes clear the distinction is real not illusory. If the appeal is by way of rehearing, the appellate court can be more interventionist than on an appeal by way of review and it will not defer to the judgment of the Panel more than is warranted by the circumstances…
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> 97….In *El-Karout* the court identified an important point regarding the admission of hearsay evidence that had not been clearly raised by the unrepresented appellant in her appeal, and so the judge invited submissions before determining the issue. That is a proper approach, particularly where a party is unrepresented, but it does not support the appellant's bold proposition that the court is required to engage in a broad examination of whether the Panel's decision is wrong or unjust, independent of the grounds of appeal relied upon by the appellant. CPR 52.21(5) makes clear that the parameters of the appeal, whether by way of review or rehearing, are defined by the notice of appeal, albeit the court has power to permit the grounds of appeal to be amended, as I have done in this case."

Like any judicial observation, that needs to be seen in the context of that case. In *Ullmer*, Mr Faux as here appeared for the appellant and sought to add an entirely new ground of appeal: that the TRA's loss of the recording of the PCP hearing was itself a serious irregularity. Steyn J made those observations in permitting that amendment, but rejecting that new ground. Here by contrast Mr Faux does not seek to run an entirely new ground of appeal, but to re-focus his existing grounds of

appeal. I accept *El-Karout* does indicate there is greater leeway to do so with a rehearing-type appeal than with a review-type appeal. That is why I have permitted some flexibility in the presentation of the Appellant's grounds at this final appeal without the need for formal amendment. Pragmatically, Mr Pritchard did not insist upon that, but instead responded to the refocused grounds on their merits.

9. In *Ullmer*, Steyn J cited paragraphs [102] and [109] of *Sastry* on rehearing-type appeals by doctors under s.40 Medical Act 1983 (as opposed to default-review-type appeals by the GMC under s.40A of that Act) (I would also add [103] of *Sastry*):

> "102 Derived from *Ghosh [v GMC* [2001] 1 WLR 1915 (PC)] are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court: (i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act; (ii) the jurisdiction of the court is appellate, not supervisory; (iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the tribunal; (iv) the appellate court will not defer to the judgment of the tribunal more than is warranted by the circumstances….
>
> 103 The courts have accepted that some degree of deference will be accorded to the judgment of the tribunal but, as was observed by Lord Millett at para 34 in *Ghosh*, 'the Board will not defer to the Committee's judgment more than is warranted by the circumstances'…Laws LJ in *Raschid* …stated that on such an appeal, material errors of fact and law will be corrected and the court will exercise judgment but it is a secondary judgment as to the application of the principles to the facts of the case (para 20). In *Cheatle…* Cranston J accepted that the degree of deference to be accorded to the tribunal would depend on the circumstances, one factor being the composition of the tribunal. He accepted the appellant's submission that he could not be 'completely blind' to a composition which comprised three lay members and two medical members…..
>
> 109 We agree with the observations of Cranston J in *Cheatle* that, given the gravity of the issues, it is not sufficient for intervention to turn on the more confined grounds of public law review such as irrationality. The distinction between a rehearing and a review may vary depending upon the nature and facts of the particular case but the distinction remains and it is there for a good reason. To limit a section 40 appeal to what is no more than a review would, in our judgment, undermine the breadth of the right conferred upon a medical practitioner by section 40 and impose inappropriate limits on the approach hitherto identified by the….Privy Council in *Ghosh* and approved by the Supreme Court in *Khan [v GPC* [2017] 1 WLR 169]."

10. However, *Sastry* was not only a doctor case not a teacher case, it also concerned sanction, which is not a ground of appeal here. Therefore, it is also helpful to consider cases of rehearing appeals concerning challenges to findings of misconduct. Mr Pritchard referred me to two doctor rehearing-type appeals on misconduct: Warby J's (as he was) decision in *R(Dutta) v GMC* [2020] EWHC 1974 (Admin) and the recent case of *Roach v GMC* [2024] EWHC 1114 (Admin). In *Roach* at [23], Ritchie J endorsed Warby J's guidance in *R(Dutta)* at [20]-[21] but noted that Warby J had not been referred to *GMC v Jagjivan* [2017] 1 WLR 4438, where the Divisional Court (albeit in a s.40A Medical Act 1983 'review-type

appeal') stressed that the High Court which did not hear live evidence was at more of a disadvantage than the disciplinary panel which did do so in scrutinising its findings of fact (especially if based on credibility) than a panel's inferences from those primary facts. I return to *Jagjivan, Dutta* and *Roach* on fact-finding, but on reflection, the most apposite guidance for a rehearing-type appeal on sexual misconduct by a teacher was also cited in *Ullmer*: *O v SSE* [2014] EWHC 22 (Admin), where Morris J (as he now is) said:

> "55…[C]ounsel for the Appellant, in the grounds of appeal and in his skeleton, puts his challenge on the basis of *Wednesbury* unreasonableness and relevant/irrelevant considerations - effectively judicial review grounds. However, in so doing, the Appellant sets the hurdle [he must] overcome at too high a level. Judicial review is not the appropriate approach in the present case. The question for this Court is whether the Decision was 'wrong' (or 'unjust because of a serious irregularity'), and not whether it was one which no reasonable panel could have reached.
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> 56. The appeal here is by way of re-hearing, the most 'interventionist' level of appeal court review….*Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 [suggests] where the appeal court is being asked to reverse findings of fact based upon oral evidence which the judge has heard, the approach of the appeal court is the same, whether it proceeds by way of 'review' or…'rehearing' (in the CPR sense of those terms).
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> 57. On such an appeal, in general, this means deciding whether the decision below can be said to be wrong. On issues of professional judgment, the Court may need to defer to expertise of the lower court or tribunal. But, on questions of primary fact, the position is different. Whilst the lower court or tribunal is the primary decision maker on questions of fact, the High Court will correct material errors of fact on various grounds, such as insufficient evidence or mistake.
>
> 58. Where the decision below depends on preferring the account of X over that of Y on the basis of reliability and credibility, including an assessment of demeanour, I have considered *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, *Mubarak v General Medical Council* [2008] EWHC 2830 (Admin) (citing *Gupta v GMC* [2002] 1 WLR 1691) and *In the matter of F (Children)* [2012] EWCA Civ 828 (as well as *Cheatle* [*v GMC* [2009] EWHC 645 (Admin)] §15). The position can be summarised as follows:
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> (1) The appellate court will be reluctant to interfere with the findings of fact made by the lower court or tribunal: *Cheatle*, §§15, 23 to 28.
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> (2) There are different schools of thought as to the significance of demeanour; on the one hand, the lower court is best placed to assess credibility, because it has had the opportunity to assess demeanour. On the other hand, demeanour is not necessarily a good or the best test of credibility and it is question of feel, which may be unreliable: compare *Mubarak* §5 with *Cheatle* §23.
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> (3) However, the predominant view is that demeanour is a significant factor. For example, the assessment, as genuine, of a witness' distress when giving evidence can be a sound foundation for a finding of truthfulness: *Re F* §44.

> (4) Thus, the starting position is that the lower court is in a better position to assess credibility and reliability of witnesses: see in particular *Mubarak* §5 citing *Gupta* at §10.
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> (5) However, the appellate court may reach a different conclusion if the circumstances so justify. Demeanour is not conclusive, and it may be that the advantage of having seen and heard the witnesses is not sufficient to explain or justify the conclusion of the court below: see *Mubarak* §6 citing *Thomas v Thomas* [1947] AC 484 at 487-488.
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> (6) There will always be inconsistencies of detail in the evidence of witnesses. The task is to the consider whether the *core* allegations are true: see *Mubarak* §20 and *Re F* §45.
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> Finally, to the extent that there is or may be a tension between *Mubarak* and *Cheatle* as to the approach on appeal to findings of fact, I give the Appellant here the benefit of any such doubt and will adopt the somewhat more interventionist approach indicated by *Cheatle."*

11. Finally on the principles, I also find very helpful Ritchie J's encapsulation of the difference between a review-type and a rehearing-type appeal in *Roach* at [14]:

> "[On rehearing]..what the High Court does is re-analyse the transcript of the live evidence and read the witness statements and the documents before the tribunal below. So evidentially and procedurally, it is not a rehearing, it is a re-analysis of the evidence without live evidence (generally). This is in contrast to an appeal by way of review, in which the evidence is limited to that relevant to the grounds of appeal and the parties are discouraged from putting before the appellate Court all the evidence before the Court below."

12. Nevertheless, Ritchie J in *Roach* did not suggest that in a rehearing the High Court should reconsider all the evidence before the PCP and reach its own conclusion regardless of the PCP's decision. As Steyn J was at pains to stress in *Ullmer*, 'the question for the High Court, whether the appeal is by way of rehearing or review, is whether the decision under appeal is wrong or unjust. The bounds of either form of appeal are defined by the grounds of appeal', even if on a rehearing the appeal court may be 'more interventionist' and 'will not defer to the judgment of the PCP more than is warranted by the circumstances'. That is why I am using the rather inelegant expression 'rehearing-type appeal', rather than simply calling this a 'rehearing' which in isolation to a lay-person might be rather misleading.

13. Nevertheless, as I determined this should be a 'rehearing-type' appeal, I have been provided not only with an appeal bundle, but the whole bundle before the PCP and indeed a transcript of the entire 4-day proceedings before the PCP (which had been lost in *Ullmer*). To adjudicate the grounds of appeal in their wide, flexible sense that I have described, I will undertake a fairly detailed summary of the background, then the TRA's investigation and the evidence before the PCP (there is no new 'fresh evidence' relied upon by either party), then the proceedings before the PCP and its decision. I then consider an issue overarching all the grounds of appeal: the relevance of principles of evidential and procedural fairness from the Criminal Courts. Then I examine the grounds of appeal in the three groups albeit in a different order than summarised earlier: the 'prejudicial hearsay ground'; the Panel's advice, self-directions and reasons; and finally, the 'inquisitorial' and evidential points.

14. Whilst the Appellant is not entitled to anonymity, the pupils making allegations have been anonymised as Pupil A, Pupil B, Pupil D (and Pupil C) as the first three alleged conduct amounting to a sexual offence, so all are entitled to anonymity under s.1 Sexual Offences (Amendment) Act 1992. But s.1(3A) of that Act also protects the name of the school, which I shall therefore refer to as 'the School'. The PCP's procedures also exclude public reference to witnesses' 'health matters' but it does not carry through to the High Court's judgment: *Sun v GMC* [2023] EWHC 1515 (Admin). I shall therefore refer to some 'health matters' where relevant.

Background

15. The Appellant is now 64 years old and was appointed as Director of Music at the School in September 1986. Only one testimonial about him from colleagues at the School and at a local orchestra acknowledges the allegations, but they show he was a well-respected music teacher well-liked by many colleagues and many pupils. I should also add that, as was clear from the Appellant's evidence before the PCP, he spoke of his love for his wife and three daughters and their support to him.

16. The Appellant suggested in his written response to the allegations that from the start in 1986 he was a House Tutor and became a Housemaster in 1988, with significant pastoral responsibilities. He suggested it was a standard pastoral routine for him at that time, as it had been for his predecessor, to check the children's dormitories to see that all was quiet and to close the fire doors before going to bed himself. There was a change in this routine around 1990. The Appellant recalls that in response to complaints from pupils unhappy with the level of supervision, the policy changed so nightly rounds were done in pairs by a tutor accompanied by the Matron.

17. It was the TRA's case before the PCP that this change in policy followed a 'warning' in 1990 to the Appellant by the School about his conduct on night-time supervision. However, the Appellant denied that and said there was no disciplinary action. The PCP dismissed that allegation and it has not been re-opened. Therefore, as it was not proven on the balance of probabilities, it must be treated as not having happened: *Re B (Standard of Proof)* [2008] 3 WLR 1 (HL) at [2]. Understandably, Mr Faux asked me not to go into the details of unproven allegations in this judgment. However, since he relies on them as having prejudiced the PCP on the 'prejudicial hearsay ground', I have to say something about them, but I preface my very brief summary by stressing that these matters were not upheld.

18. A school document records a complaint from pupils to a teacher, Mr B (whose name I anonymise, as the Appellant says he was later dismissed for gross misconduct) in February 1990 that the Appellant on dormitory rounds the previous evening had made 'shuffling noises' in the dark near boys' beds; that the summer previously he had put his hand under a sleeping boy's duvet; and on another occasion made a boy undress in front of him. Notes apparently taken by the then-headteacher show he believed this was a misunderstanding and told the boys who had reported it that:

> "[W]hilst your worries are genuine, they are based on a faulty interpretation of what you have seen. [It is] right and proper [he] visit dorms late at night – check you in bed, doors, windows and picking up duvets so you don't get cold. [He is] a very nice man, very caring/conscientious, very upset that any of you have misunderstood his dorm visits. Any gossip you hear about him

> doing anything wrong is totally untrue. However, in order that your worries should be at an end, the dorm visits late at night shall be…by a matron or two masters and they will not touch duvets but merely shut windows, doors etc and use a torch to see that you are in bed and quickly leave the dorm."

It appears in a meeting with the Appellant, the headteacher said something similar:

> "No touching duvets or going close to a bed and the minimum length of time in a dormitory. Don't stay long in bathrooms or go in showers."

Therefore, this was plainly not a 'disciplinary warning', only a change in process.

19. This impression is rather fortified by the fact that only a few years later in 1998, the Appellant did receive a formal written warning from the School for a completely unrelated matter. Whilst he denied hitting a pupil as alleged, he did accept 'pushing him against the door several times'. There was no suggestion of any previous warning in 1990, as one might have expected had there been one. The Appellant complains this warning was irrelevant and should not have been shown to the PCP.

20. In Easter 2004, Pupil D would have been 9/10 years old. He was not a pupil at the School, but was a choral singer and attended residential courses, when the Appellant was sometimes responsible for his pastoral care. In his statement, Pupil D described the Appellant as 'engaging' and that he 'came across as a very sincere, warm and friendly person' and that 'he 'got on with him quite well'. As I will detail, over a decade later, Pupil D alleged at this time, overnight on a residential course (albeit not at the School), he wet his bed and the Appellant asked him to remove his clothes and then applied lathered soap to his body including his groin and genitals. This made Pupil D feel very uncomfortable and he cried and rocked himself to sleep. Pupil D also alleged the next morning, he was taking a shower in a communal shower when the Appellant pulled the shower curtain back and asked him if he was ok and looked at him when he was naked. Pupil D says he told no-one at the time.

21. Pupil D suggested in his later statement that he pretended like nothing had happened for a while, but he started to experience issues with his mental health when he was 17 (his statement said in 2017, but in his evidence to the PCP, he clarified that meant when he was 17, i.e. in around 2010/2011). Aged 17, Pupil D saw psychiatrists because of his ongoing mental health issues and suggests as he was walking to school what he says happened with the Appellant came into his head, but that he tried to bury that memory because he felt ashamed and embarrassed. Later, Pupil D stopped seeing his psychiatrist as he thought he was fine and went to music college. However, he started to see a psychiatrist again and around the time he had restarted doing so, he first reported his allegation to a friend, then to the Police, who interviewed him in October 2017. His initial account was summarised in this way:

> "Between 11-18th April 2004 in the Easter holidays, he went away with the music group…. on a residential course…[He] urinated in his bed and went and looked for help, was aged 9. He approached Andrew [the Appellant] who was in the next room and he was taken to the bathroom. Andrew asked him to take his clothes off and began to pour lotion on his own hands and started to rub lotion over his body mainly focussing on his genitals for a long time. Then dried with a towel. Went back to bed. He came to check on him. The next day while having a shower Andrew pulled back the curtains."

22. As a consequence, the Appellant was arrested and then suspended by the School in November 2017. The Police seized a number of items from his home but found nothing incriminating there or on his electronic devices. As part of the investigation, the Police also wrote to the pupils named in the School's records from 1990 as complaining to the School at that time and in January 2018 spoke to three of them who made allegations against the Appellant. Those are essentially the same unproven allegations reported to Mr B in 1990 and discussed by the headteacher with the Appellant as I described earlier. The 2018 police statements add little to the 1990 allegations recorded by the School, but do also include other tittle-tattle about the Appellant. I return to these documents on the 'prejudicial hearsay ground'.

23. In May 2018, the Police decided to take no further action on Pupil D's allegations, or the other matters raised by their investigation (including the 1990 complaints). On 11th June 2018, the Appellant's suspension was lifted and he returned to work. However, on 3rd July 2018, the School received a complaint from the parent of Pupil A. The parent told the School that Pupil A had said that 'on a school music trip to France when he was in Year 6 (Form 2), the Appellant had asked him and another boy (namely Pupil B) to remove their towels after showering to check they were clean. The parent suggested Pupil A had said initially that this was one trip but then that it was more than one trip. Pupil A also reported that the Appellant asked another boy, Pupil C, to sit on his lap. The Appellant was immediately re-suspended.

24. Pupil A, Pupil B and the Appellant (Pupil C having already left the School) were interviewed by the School. Its report summarised its investigation:

> "*Incident 1*
>
> This incident was alleged to have taken place between 4th - 7th June 2015, involving [Pupil A, who] alleges that 'I *was showering, Mr Bruce would walk in just to check we were showering.'* During investigation, [the Appellant] refuted this claim, stating *`I don't think so, I'm trying to think of a scenario. He says something happened I'm just trying to think of any circumstances where it might have happened.'*
>
> *Incident 2*
>
> This incident allegedly took place between 9th -12th June 2016 where it is reported that [the Appellant] entered the hotel room of [Pupil A] and [Pupil B' and asked them to remove clothing/towels to check they had cleaned sand off their bodies after some time at the beach. During investigation, both boys agreed that [illegible – one] stripped on order, however there is a discrepancy as to whether [illegible - the other] did…When we spoke to [the Appellant], he refuted this claim and stated 'I *don't recollect anybody being naked in that situation, I do recall the sand from the bedrooms upsetting the hotel owners but wouldn't have inspected naked children.'*
>
> *Incident 3*
>
> It seems incident 3 happened on 11th July 2016…. Both boys recollect AB asking a now ex-pupil [Pupil C] to sit on his knee. It was reported that this was in front of a number of other boys on that trip. *During investigation, AB stated 'I can see situations where it might've been a joke, but I don't remember it happening, others would have been around including staff."*

25. Under disciplinary investigation, the Appellant resigned on 6th September 2018. The School accepted that resignation on 10th September 2018 but explained that they had a duty to refer the case to the TRA, which the School did on 13th September 2018, enclosing relevant paperwork, including the 1990 notes discussed and the internal investigation in 2017-2018. The Appellant wrote to the School responding to the allegations on 23rd October 2018, as I said, stressing that he never received a warning in 1990 and setting out his normal practice on his dormitory rounds (both of which I have already summarised). I shall focus on his response to the allegations of Pupils A and B about themselves (I need not dwell on the Pupil C allegation as it was not upheld and at that stage there was no allegation relating to Pupil D):

> "1a) *Entering and remaining in a pupil's dormitory bathroom whilst he was showering. Allegation made by 'Pupil A'.*
>
> We had just returned from the beach and the two boys in question were covered in sand. It is true to say that I did enter the bathroom but it was more of a question of putting my head round the door to make sure that pupil ('Pupil A') was indeed showering. He was showering behind an opaque screen. I certainly did not linger. I have to say, although I didn't think anything of it at the time and there was nothing in the reaction of the pupil that led me to think he thought anything of it either, I sincerely regret now putting myself in this position and I must acknowledge that I should have realised that being there left myself vulnerable. By way of modest mitigation I would report that a parent had complained to me at the end of a tour to Italy that her son had been in my care for a week and he had not showered once. She was clearly very unhappy about this although her son was older (year 8) than the boys in this investigation (Year 6).
>
> *1b i) Asking pupils to remove their towels. Allegation made by 'Pupil A':*
>
> This did not happen. I have never asked a pupil to remove clothing or a towel. In the accounts supplied by the pupils I would point out that this claim is at odds with the account given by 'Pupil B'. I would suggest the claim that this happened was in response to what could be perceived as a very leading and binary question given by my colleague who had the unenviable task of investigating the matter.
>
> *bii) Asking a pupil to face me whilst he was naked or wearing only underwear. Allegation Made by 'Pupil A'*
>
> This did not happen. I did not and would not do this. Again, the account from 'Pupil A' is at variance with the account given by 'Pupil B'."

The TRA Investigation

26. The TRA took statements from Pupils A and B in March 2019. Pupil A's statement described three incidents. Firstly, in June 2015 on a school trip to Belgium where he said the Appellant: *'would enter the bathroom and ask was I showering properly. I know it was [him]…I could see him through the shower door'.* Pupil A described that in June 2016, on a trip to Normandy, he was with Pupil B, they went to the beach. When they got back, they showered, but he said then the Appellant:

> "…came into our room and said he did not trust we had cleaned ourselves properly after being on the beach. We were told to remove our clothing so

> he could check that we had properly cleaned ourselves. We were told to remove our boxer shorts. [Pupil B] and I both removed all our clothing. [Mr Bruce] looked us over and then told us to put our clothes back on."

By contrast, Pupil B's account of this was rather different:

> "[The Appellant] asked us both if we had enjoyed the beach. I can recall confirming that I did enjoy the beach, though it was quite hot. I do not recall if Pupil A responded. [The Appellant] said something to us both like *'Have you got all the sand off?'* I do not recall if either of us responded. Mr Bruce crossed the room and walked over towards Pupil A….
> As he was doing this, I briefly turned my back to look in the closet for my shorts. I did not find the shorts and turned back around to face Mr Bruce and Pupil A. I saw Mr Bruce reach out and lift a section of Pupil A's towel away from his body, so it was possible to see a section of Pupil A's naked lower body. [He] dropped the towel back down again and Pupil A held it next to his body with one hand. [He] said to Pupil A something like…*'Spin in* a *circle'*. ….Pupil A held on to his towel with one hand (Pupil A is left hand dominant). The rest of Pupil A's towel was trailed down to the floor. Because Pupil A was only holding on to his towel with one hand, large sections of Pupil A's naked lower body were exposed. Pupil A did a full body spin around on the spot. The spin lasted about 5 seconds. I don't recall Pupil A saying anything; he was giggling. Mr Bruce squatted down slightly and picked up a handful of Pupil A's towel, the section of the towel between Pupil A's hand and the floor. Mr Bruce stood up again and used this towel to do two rapid brushes from the middle of Pupil A's back down to the top of his bum. As [he] was just over a head taller than Pupil A, he had to lean over Pupil A to reach that far down ...I did not see [him] use his other hand on Pupil A. All the contact I saw between Pupil A and [him] was through the towel; there was no skin-on-skin contact. At the end of the 5 seconds, Pupil A pulled his towel back up around himself properly, covering his whole lower body again.
>
> [The Appellant] then walked towards me [and] said something like *'Can you take your towel off so I can check if you have sand?'* With one hand I lifted the towel off my shoulders. I held the towel in my hand and let my arm fall back to my side, so the towel was trailing down to the floor. Without being asked to, I performed a quick 3-4 second spin on the spot like Pupil A had. [The Appellant] was farther away from me than he was to Pupil A when he did the spin. [He] did not touch me or come any closer. [He] did not ask me to take off my underpants; I kept these on the entire time. [He] then said to both of us *'Thank you'* and then left the room."

Therefore, it will be seen that Pupil B's description of the allegation from 2016 differs from Pupil A's description, including that the Appellant wiped Pupil A's back with the towel Pupil A had on, neither of which Pupil A mentioned. Whilst both Pupil A and B also detailed an incident where the Appellant asked Pupil C to sit on his lap, as the PCP did not uphold that allegation, I need not go into detail.

27. Pupil D's statement was not taken until November 2023, more than four years after Pupils A and B (there was no statement from Pupil C). I earlier explained what Pupil D said of *the later effect* of what he alleged happened, but his allegation itself was:

> "In Easter 2004 when I was aged around 9/10 years old, I attended a residential course…during which [the Appellant] was the Musical Director. On one of the nights, I was looking for help as I had wet my bed. I was staying a large dorm room with around 10 other children which had a common room in the middle of it. [The Appellant's] room was next door to the dorm and there was a bathroom next to this. I cannot remember whether the bathroom was an ensuite and a part of [his] bedroom, or whether the bathroom was just next door to his room. Next to that was a communal shower room and locker room. I went to get help from [him] in the night as he was staying next door to our dorm, and he was assigned to me pastorally. In my mind, I was expecting that he would help me to clean up the sheets.
>
> I remember that I knocked on his door for help and then the next thing that I remember was ending up the bathroom. I don't quite remember how I got there, but I do recall feeling very confused by it. [He] asked me to take my clothes off in the bathroom, which I did. I was stood in the middle of the room and [he] proceeded to lather me up with soap whilst using his hands. I found this very odd at the time as I was capable of cleaning myself. [He] paid particular attention to my crotch and groin area, and he touched my genitals when he was cleaning me. It felt like prolonged abuse to that particular area of my body. I remember very distinctly that he used Lavender soap which has become a bit of a trigger for me in later life.
>
> Whilst it was happening, I felt very uncomfortable. It was hard to pinpoint how long it lasted because I just froze up and felt humiliated and embarrassed…..I felt very confused by the whole incident at the time.….
>
> I can't recall whether [he] dried me with a towel or whether I did this myself. I was then left in the bathroom whilst [he] left. I believe that he was changing my bedding, but I cannot be certain of this. When I went back to my room, I got into my bed, and I was crying and rocked myself to sleep….
>
> At some point, [he] came round with a torch into the dorm whilst I was crying. He checked up on me and asked if I was okay. I can't remember if there was any other conversation before [he] went back into his room.
>
> The following morning, I was taking a shower. The showers were in a communal washroom where each individual shower was separated by a shower curtain. I was taking a shower and [the Appellant] pulled the shower curtain open whilst I was in there. I recall being a bit shocked and taken aback as I was not sure who was opening the curtain. I believe I was facing him, and he asked me whether I was okay. I remember that he stared at my body up and down whilst I was naked. I cannot recall how long this lasted, but I do not think that it was too long."

28. It is highly regrettable that there was a delay of over five years between the referral to the TRA in September 2018 and the notification by the TRA to the Appellant in February 2024 of the PCP hearing to take place in April-May 2024. The TRA suggest there was a delay with the Pandemic and Police disclosure, but this hardly explains such a long delay. Nevertheless, the real issue with the delay is the effect it had on the cogency of the evidence that was given and fairness to the Appellant, which I will consider when dealing with the ground of appeal based on delay. In any event, the TRA's letter explained the PCP hearing would be online – and did

not specifically explain the Appellant could object to this and he did not object. It set out these allegations (it is unclear whether it included the TRA bundle):

> "You are guilty of unacceptable professional conduct and/or conduct that may bring the profession into disrepute in that whilst employed as A Director of Music at [the School]:
>
> 1. You engaged in inappropriate and/or unprofessional behaviour towards one or more pupils, including on one or more occasions:
>
> a. In or around June - July 2015 entering and/or remaining in the dormitory bathroom whilst Pupil A was showering.
>
> b. In or around June - July 2016 by: i. Entering Pupil A and B's hotel room and asking Pupil A and/or B to remove their towels. ii. Telling Pupil A and/or B to face you and/or turn around or words to that effect whilst he was naked or only wearing underwear. iii. Lifted Pupil A's towel away from his body whilst he was drying, exposing his naked lower body. iv. Used a towel to brush and/or wipe down Pupil A's back.
>
> c. In or around June - July 2016 by asking Pupil C to sit on your lap and/or suggesting that he should.
>
> d. In or around Easter 2004 by: i. Asking Pupil D to remove his clothes after he had wet the bed. ii. Using your hand to rub and/or apply lotion and/or soap to Pupil D's body and/or genitals. iii. Pulling back the shower curtain and looking at Pupil D whilst showering.
>
> 2. You behaved as may be found proven at la and/or 1 b and/or l c and/or 1d above despite previous advice and/or guidance and/or warnings regarding similar behaviour in or around 1990.
>
> 3. Your behaviour as may be found at la and/or 1 b and/or lc and/or 1d above was sexually motivated and/or conduct of a sexual nature."

29. The Appellant's statement in response stated so far as material:

(a) In response to Pupil A's statement, the Appellant said as follows. On Allegation 1a in 2015, he said he did not accept going into the bathroom when Pupil A was showering, but it was possible Pupil A could have seen him through the open door. He suggested what Pupil A was alleging was 'so clearly unreasonable behaviour [that] he would have known that at the time'. On Allegations 1bi-iv in 2016, whilst accepting that they had a conversation about sand, he denied asking either Pupil A or Pupil B to remove their clothing, which he pointed out Pupil B did not mention. He also denied the 'lap incident' with Pupil C (but I need not dwell on that).

(b) In response to Pupil B's statement, the Appellant said as follows. He pointed out that some of the detail in Pupil B's account as happening to Pupil A was not in Pupil A's account and categorically denied seeing either naked. (Likewise, I need not dwell on his denial of the 'lap incident' with Pupil C).

(c) In response to Pupil D's statement, the Appellant expressed sympathy with his mental health issues, but denied all his allegations:

> "I was very sad to read this account from Pupil D. I am sorry to say I do not recall him or the incident. If he approached me, I would have

> provided appropriate assistance to him such as replacing bed linen. He alleged in his report that I touched him inappropriately. I strongly deny this. The matter was investigated by the Police and no further action was taken. As far as asking him to remove his clothes is concerned, which I have no specific recollection of dealing with this, I would probably have helped him find something clean to wear but he will have undressed and dressed himself and most probably whilst I was dealing with the bed. I did not apply any lavender soap to his body….In fact I do not think I have ever used lavender soap. I certainly would not have had any and it doesn't sound like he had some either so I am not sure where this would have come from. Regarding pulling back the shower [curtain] the following morning, the only thing I can think of here is that I may have called in and asked if he had shower gel or shampoo and may then have passed some around the curtain. It should be remembered that this was a very young member of the course at 9 years old and any action I took will have been in an endeavour to provide the best care for him."

The Appellant also gave his response to the 1990 issue I summarised earlier.

30. Case management directions were made on paper on 5th April 2024, where the PCP noted the Appellant was no longer represented. The PCP made 'special measures' directions for Pupils A, B and D to be cross-examined by a specially-appointed advocate rather than the Appellant personally, as is typical of similar criminal and family cases involving unrepresented defendants. The Panel also noted that the Appellant had not submitted any further documents or response to that application.

The Hearing before the Professional Conduct Panel

31. The substantive PCP hearing was conducted online on 30th April to 2nd May 2024. The PCP consisted of two lay members - including the Chair - and one teacher member and was supported by a legal advisor (whose directions I will discuss in more detail later). The TRA's case was presented by a lawyer Ms Quirk and the Appellant represented himself but had an appointed-advocate Mr Barlow to cross-examine Pupils A, B and D, who were the only witnesses for the TRA. At the start of the hearing, the Appellant confirmed he was content to represent himself. A member of the panel disclosed a tenuous connection with the School but there was no objection taken to her participation. There were also minor and unopposed applications to apply the 2018 not 2020 PCP procedures and to admit a further clarification statement from Pupil A and to very slightly amend allegation 1a.

32. The first issue of relevance to this appeal was raised by the Appellant himself, who having earlier confirmed that he had received the bundle, objected to part of it:

> "I'm surprised to see in the pack issues relating to an allegation back in 1990. It seems to me that this case is is based on the witness statements and accounts from Pupils A, B and D and on their testimony over the next two days. The issues in the pack relating to 1990 are not really relevant to that case, but I have never even known the names of the complainants back in 1990. They are not appearing in this case. All their evidence, I would suggest, is therefore hearsay. …It's essentially propensity evidence which

> gives a prejudicial effect and whether that outweighs their probative value. These issues were investigated at the time and no fault was found on my part. There was no action taken against me of any kind. Erm, in the chronology, it is claimed I was given advice to do the bathroom supervision. I have to say that is news to me and nobody will be giving evidence to say this happened. So, I'm very surprised why this is even being raised in the context of this case. It seems to me that that is actually significantly prejudicial, and the case should be about dealing with the complaints from the three pupils. I respectfully ask if you could give that your consideration"

Notably, the Chair investigated this issue with the Presenting Officer and the PCP's Legal Adviser before giving their decision. He responded to this (my italics):

> "Thank you, the issue is, I think, Miss Quirk, that this evidence— or sorry, allegation is prejudicial. It relates to an event which stretches back to 1990. I can't speak for the Panel, but *I have to accept that I struggled to find any evidence in the bundle which relates to a specific warning given in 1990,* but obviously, you may wish to cover that in your representations. Erm, do you want to address this then at this stage, please ?"

33. In response, the TRA's Presenting Officer Ms Quirk said (my italics and underline):

> "This is an issue that has been raised this morning bearing in mind that this draft bundle, has been before [the Appellant]'s representation from January of this year. As you know, there is an opportunity to respond to the draft bundle and request any documents be removed. Sometimes you have a disputed bundle, for example, before you. That has not happened…. *In terms of relevance, you will be drawn to Allegation 2 [which] relates to the behaviour at 1a, 1b, 1c and 1d occurred essentially despite previous advice or guidance or warnings regarding similar behaviour in or around 1990. So, in terms of the documentation relating to 1990, <u>we are not asking you to make findings that that conduct occurred</u>. That information is relevant in the sense that there were concerns raised in 1990 and you need to be aware of those concerns as to whether it was, erm, similar conduct to what is being placed before you in terms of A, B and D. You then need to ascertain if a warning was given in respect of that conduct and that relates specifically to Allegation 2*. [The documentation] is handwritten notes at pages 184 to 193, which I am proposing to take to you throughout the course of my closing and opening. Those…may be difficult to read for some Members of the Panel given they are handwritten but there are references to the advice that was given to [the Appellant] particularly on pages 188 and 189 of the bundle and there is a reference to what was said in conversation to [him].
>
> We accept that that will be hearsay evidence before the Panel but, of course, pursuant to [paragraph 4.18 of the 2018 procedural rules, that 'The panel may admit any evidence, where it is fair to do so, which may reasonably be considered to be relevant to the case'] in terms of admitting evidence, you only need to be satisfied that it is fair to do so and reasonably considered relevant to the case. So, we invite you to accept the evidence as hearsay but also accept that there may be weight that you adopt to this hearsay evidence or do not and you will assess the weight of that evidence when considering the allegations. But we say in terms of the evidence to 1990, it goes to

> Allegation 2 which you have to consider whether guidance or warnings or advice were given in respect to similar behaviour that occurred in respect of Pupil A, B and D. So, it is the similarity of that conduct and whether advice or guidance was given in respect of that."

There was then a discussion between the Presenting Officer and the Chair clarifying the documentation from 1990 which I have already summarised. The Presenting Officer focussed the PCP's attention on the headteacher's instruction:

> "No touching duvets or going close to a bed and the minimum length of time in a dormitory. Don't stay long in bathrooms or go in showers."

However, the Presenting Officer did not draw the PCP's attention to the headteacher's belief at the time that the allegations arose from misunderstanding.

34. The PCP then asked for legal advice from its advisor, which was rather brief:

> "I have no formal advice to give on the allegations of whether…it is prejudicial or not. However, this is the case that the TRA has brought before it and as the Panel will be aware and the parties will be aware, it is for the TRA to prove on the balance of probabilities, that Allegation 2 has been proven. So, I believe that we would be right to commence with the evidence and hearing of the claim itself."

The Presenting Officer had no objection to the advice but the Appellant maintained his position that he had not been given a warning and to doubt the notes as proof of what happened. The Chair then said this to the Appellant by way of explanation:

> "The allegations that are before the Panel, the onus is upon the TRA to prove to the Panel, on the balance of probabilities, that these allegations did occur….So, when the Panel retires to consider its decision, it will have had the opportunity of hearing from the witnesses but also importantly, from your point of view, your representations and your evidence… So, we're not, at this stage, deciding anything until we've heard all the evidence, but I would say the onus is on the TRA to prove to us, on the balance of probabilities, these allegations have been made out. Simply because they're put in a form, does not mean, in any imagination, that we will necessarily find them proved. We have a discretion, that's what the hearing is about."

Having retired to consult his colleagues, the Chair then gave this ruling (my italics):

> "Mr Bruce, we have given careful consideration to your representation concerning possible, prejudicial effect upon these proceedings if we were to allow Allegation 2 to proceed in its present form and, as I explained earlier, this is just, at this stage, preliminary application.
>
> *We do not feel that it is prejudicial at this stage*. Obviously, as I stressed to you earlier on, when you come to give your evidence, you can give evidence to that effect and make representations, which the Panel will decide upon, and I would stress, obviously, that the onus of proving these allegations rests upon the TRA. If the Panel feel that they have not met that requirement, then obviously the Panel has the power to dismiss the allegation. *But for the purpose of this application, at this stage, the Panel does not take the view that it is prejudicial to proceed…"*

35. Therefore, the PCP refused the Appellant's application to exclude the 1990 material because they did not consider it was prejudicial 'at that stage'. What they seem to have meant was that (as the Presenting Officer had said), the PCP were not being asked to adjudicate the 1990 allegations themselves, which were only background to an allegation the PCP were being asked to adjudicate (i.e. Allegation 2). This was that the Appellant had in 1990 been *warned* about concerns of 'similar behaviour' to the more recent allegations (i.e. Allegations 1a-d). So, the Appellant could put forward his objections to the 1990 material in his evidence and representations on Allegation 2. Consequently, the PCP considered the admission of the 1990 material was not prejudicial at that stage – i.e. it did not consider that it was necessary to exclude that evidence *at the start*. That did not mean the PCP could not *later* decide that the 1990 material was more prejudicial than probative, to adopt the Criminal Law terms the Appellant had used. There was no separate discussion of - or objection by him to - the 2018 Police statements from the 1990 complainants.

36. The Chair then proceeded to confirm the contents of the bundle (to which there was no further objection from the Appellant) and gave a standard explanation of the hearing and formally put the allegations to the Appellant which he denied. The TRA Presenting Officer then gave an opening statement which rightly acknowledged the potential effect of delay, but also added this important note of caution:

> "You will have information within the bundle regarding, potentially, the school investigation, the police investigation and whilst their evidence, which was produced during their investigations, is relevant in this case, any decisions that they made should be placed outside of your mind. Your decision should be based on the evidence before you, the evidence you have heard and your judgement. You should not be influenced by previous decisions which, possibly, were made on a different standard of proof and also with different evidence before that individual or organisation. You should assess these allegations afresh."

37. The TRA then called Pupil A. In his cross-examination by Mr Barlow ('CB'), the following was said (original italics being quotations from documents/statements):

> "*CB* [Pupil B's account] doesn't agree with your version of events, does it, because it says you were wearing— you were naked, you didn't have shorts on, whereas your version of events says you had shorts on.
>
> *Pupil A* I'd got boxer trousers, with a towel around me.
>
> *CB*...Yes, forgive me, but this says specifically wearing no other clothes, so you were in the towel and that was it, according to h— his statement….Do you accept that's— that's inconsistent with your version of events ?
>
> *Pupil A* Erm, it's different but once again, Pupil B almost certainly hadn't seen me with the without the towel on, so he would not have known at the time if I had boxer shorts on because all he could see was a towel. You'd have to ask Pupil B….
>
> *CB* Then [Pupil B says in his statement] "*I saw Mr Bruce reach out and lift a section of Pupil's A towel away from body, so it was possible to see a section of Pupil A's naked lower body*." Is that wrong?

Pupil A I'm not saying it's wrong at all… Just because I don't remember something, doesn't mean it doesn't happen. I'm not accusing Pupil B of lying….

CB….So, you do recollect turning around in a circle?

Pupil A Erm, correct.

CB I don't think that's in your statement…..Why would that be?

Pupil A No comment…

CB [Pupil B's statement says] "*Mr Bruce used his towel to do two rapid brushes to the middle of Pupil A's back down to the top of his bum*." That would be wrong, wouldn't it, because your version of events is that there was never any physical contact?

Pupil A: To the best of my knowledge, the stuff I said in the witness statement happened. I don't recollect this happening, that's not to say that I'm accusing Witness B of lying, really the same I did earlier."

38. Pupil B was called and Mr Barlow again put the inconsistency with Pupil A to him:

"*CB*: Is it your recollection that Pupil A was wearing boxer shorts?

Pupil B: At this point, I wouldn't be able to recall but, you know….from the first interview that I had where I state that he was wearing boxer shorts, that would, in theory, be my best recollection of it because it was closest to the time of the incident. So, erm, I'm probably saying that he must've been wearing pants then. But I can't say for certain whether he was or wasn't…. I don't know about others but, you know, typically if I shower, I— I wouldn't put pants on and then re-wrap my towel around myself. So, whether he had— ooh. Whether he had pants on or not, I couldn't give you a confident response.

CB Well, if you can't be confident whether he had pants on or not, you can't be confident that he didn't have anything on, can you?

Pupil B Erm, I'm confident that he had— had a maximum only pants, nothing more than that.

CB [Pupil A's statement] says, "*We were told to remove our clothing*." Isn't it your recollection that you were not told to remove your clothing?

Pupil B My recollection is I personally was not asked to remove my clothing. Regarding Pupil A, my recollection is that he was asked to— whether it was to remove clothing or remove his towel, it was to remove something. Either of the two or both.

CB Would you have any idea why he says to contrary?

Pupil B You know, at the age of 11, you probably won't remember exactly what happened two years down the line…maybe because he was, you know, too focussed on undressing himself, he may have just assumed that I did the same, erm, but I personally did not, erm, take any clothes off. I think if anything, I put my shorts on."

39. The next witness was Pupil D, who of course was the sole witness on allegations 1di,ii and iii which he only made over a decade after he says they occurred. One issue Mr Barlow explored was Pupil D's mental health, especially as in evidence-in-chief (as I noted), Pupil D corrected his statement from saying he had a vivid memory of the incident popping into his head in 2017 to that happening when he was 17 when walking to school. As this related to health, it was in private:

> "*CB*..Have you found that PTSD has affected your memory with things?
>
> *Pupil D*: Erm, no. I think the significant triggers are really obvious to me…. The general specific details with a memory can become, for me, like around like an event, such as the significance of this, erm, so I remember the significant event but, you know, like exact conversations, more specific nuances within that event are harder to remember. One thing that I worked through [with psychiatrists] is the false memory. Erm, you can create false memory by trying to think too hard on those nuances around the significant situation. So— and that could lead to sort of misunderstanding it. So, outside of the— this raw memory that I have… I think she tried to not explore too much around that.
>
> *CB* Right, I just need to understand some more about this false memory. Why were you going through a false memory process with a psychiatrist?
>
> *Pupil D* No, it's discussing how, erm, false memories can be a thing in any— erm, for anyone if they— erm, like so say if I create some confirmation bias around something that I wasn't 100% sure of, then that could result in a false memory at a later date….[T]hese are psychiatric terms or, erm, exercises that were introduced to me. So, rather than myself having anxieties around something like a false memory…These were exercises where…let's not explore too deeply into stuff that's unclear because that can result in that. So, it was exercises…with… my psychiatrist, at the time
>
> *CB* And at that time, you hadn't told your psychiatrist about this incident that you allege?
>
> *Pupil D* Erm, so the timeline with that, erm, yeah, that would have then been at that time, yeah
>
> *CB* You hadn't talked to her at that time ?
>
> *Pupil D*: I think that once— once we were going through talking about the incident, I had informed them. So, erm, timeline, yeah, I'll just line it out. So, I had the operation then went to go and see my psychiatrist. Was seeing him for a few months, erm, and that was partly around the OCDs related to needing the bathroom, etcetera and trying to figure that out. I was receiving [Cognitive Behavioural Therapy]….I can't remember exactly the month that I started seeing them, it was data I can easily get hold of, erm, but then, erm, the following— erm, a couple of months later, it was then that I'd sort of come to this realisation that, erm, this event— not realisation, it was more that I— I was feeling a lot clearer about how this event occurred, erm, and, erm, I then was able— I then told my psychiatrist and psychologist during my therapy which, yeah, was based around the CBT. So, that is then when we went on to talk more about my details….

> *CB* So, was it around 2017 that you told your psychiatrist for the first time ?
>
> *Pupil D* Yeah, yeah, so, erm, it was around— erm, so I started seeing them in 2016, again the psychiatrist. Erm, I told a friend a believe vaguely off the top of my head, early 2017/late 2016, erm, and then spoke to my psychiatrist within— erm, yeah, erm, the week after that or so."

Whilst that passage of cross-examination was in private as it related to Pupil D's health, following the *Sun* case and given Pupil D's anonymity, I have set it out in this judgment as it is key to one of the Grounds of Appeal. That also partly relates to the absence of Pupil D's medical records, which he offered to provide:

> "*Pupil D*: You know…I'm sure my psychiatrist would be happy to share dates of appointments or anything like that, or any specific medical information, because obviously I'm not a medical expert and I'm just trusting in their discretion— well not discretion, in their expertise to make sure that I am, you know, having the best treatment that I can.
>
> *Chair* Thank you. I'm sure the TRA and Miss Quirk has noted that and obviously will consider it."

40. However, Ms Quirk and the TRA had not and did not obtain those records. Instead, she took this straightforward approach to Pupil D's memory in re-examination:

> "*HQ*…You gave a lot of evidence at the start of your cross-examination and that evidence stemmed to kind of the effects on memory, essentially….In terms of your witness statement, how are sure are you that the event in the bathroom, in terms of the touching and lotion or the soap, and the event in the shower the next day occurred, as you put in your statement ?
>
> *Pupil D* I'm 100% sure that these occurred. I have no doubt in my mind that these events occurred. The point I made around memory was of trying to pin down specific— erm, the more specific details that went along with the event, but the actual event did occur."

41. Before leaving Pupil D's evidence, notably one of the PCP ('SR') did ask questions of Pupil D about his relationship with the Appellant before and afterward:

> "*SR:* Do you think your relationship with Mr Bruce prior to these events was any different compared to any other student or pupil ?
>
> *Pupil D* Erm, prior to the events ? Erm, I think— I seem to remember that he thought I was, erm, quite good and, in my mind, I got attention from him in a positive way. Erm, I wouldn't say it was of a grooming nature, I wouldn't put, you know, that status on it but I wouldn't say there was a negative around it at all. it just felt like a positive— positive relationship.
>
> *SR* Okay, and afterwards ?
>
> *Pupil D* Then afterwards, as I recall, yeah, some went back to that kind of same relationship I'd say, yeah."

42. The Appellant then gave evidence. He started by reading his statement, including:

> "Pupil A gives an account of me walking into the bathroom, he says, on a number of occasions. In my initial response to this back in 2018, I

> acknowledged that I had entered the bathroom. This acknowledgment was a big mistake on my part and at the time, I was taking advice from my local union representative. I had explained to him that I might have been visible through the open door to the bathroom and he felt there was little difference between that and being in the room. Whether he is right on that, I'll leave to your judgement. He felt that in this case, it could go against me to deny it. However, I didn't actually enter the room. I may have had a conversation through the open door, to the effect that time was moving on and Pupil B should get a move on, and it is possible that might have been visible through the opaque screen. It would have been a momentary thing and like the pupil, I thought nothing of it at the time.….You've heard from Pupil A that I entered the bathroom on numerous occasions. First of all, I would point out that I never entered the bedroom that led to the bathroom without being invited in. Pupil A suggested this is not the case, but Pupil B refers to how I knocked on the door, which he opened before I entered. That was how I approached the rooms.…..[Pupil A] says I asked him if he was showering properly, not a likely conversation, and then says he knew it was me because he could see me through the translucent door. Well, presumably, it would have been the conversation that was the bigger give away. This doesn't really make sense. He claims I told them to remove their boxer shorts. Well, this absolutely did not happen and if it had happened, I would have expected it to be in the accounts from both pupils. He says clearly that both pupils removed all their clothing. No. In Pupil B's account, he was wearing pants with his towel around him. He doesn't suggest I asked him to remove any clothing, because I didn't, and neither did I ask Pupil A to remove clothing either. I want to be very clear on this. At no point did I see either pupil naked. So, why does Pupil A say it? What is clear is that there were a number of leading questions in the interview with the school….by asking, '*Did he ask you to take your clothes off*?', a closed question, Pupil B opted for the binary answer, '*Yes*,' and this is the position he goes on to defend, even until his account before this committee. I would suggest that that really highlights the dangers of closed and leading questions. It would have been quite possible to say, '*Can you remember what Mr Bruce said to you? did he ask you to do anything? would you like to tell us more about what happened and why*?'."

43. The Presenting Officer objected to what she called 'submissions'. The Chair said:

> "*Chair* I appreciate the point that you make and obviously, if Mr Bruce had been legally represented, this wouldn't be the situation. The problem that I'm sure you recognise is that Mr Bruce is not represented, so he's playing the twin role, as it were, at both being a witness and putting himself in the shoes as a representative and it's very, very, difficult for someone who doesn't have a legal background to understand that distinction. I think at this stage, subject to any advice I may receive from the Legal Adviser, that I would like to allow Mr Bruce to continue in order that we can hear what he has to say, erm, and it may well be that we have further questions later on. I'm minded at this stage to allow him to continue to do so, albeit he's heard the comments which have been made and no doubt understands the distinction. Mr Dave [the Legal Adviser] any comments you want to make?

> *PD* No, I don't have any comments. Thank you, Sir.
>
> *Chair* Thank you. Mr Bruce, I've emphasised, I think, from the very outset of this case that you're not represented. We understand that you're not represented, and we do want to give you every opportunity to be heard. Ordinarily, there would not be any leeway if— if you weren't represented but, on this occasion, I think we will allow you some leeway. Erm, it's a very, very difficult distinction to draw when you're giving evidence, erm, as opposed to making a closing submission. Ordinarily, a closing submission is the person would summarise all the evidence and make representations to us, but obviously, your role is a difficult one. So, I will, erm, allow you to continue at the moment. If it does become more of an issue, then we may have to consider it further. So, if you'd like to continue.
>
> *AB* Thank you. If I could just say, equally from my part, I'm very happy to— if you would prefer me to stop there and, erm, move to questioning, we could do that and I could these comments [later]
>
> *Chair* No, no, I think it's important that you— it's not for me to tell you how to conduct the case and I'm— because obviously, that would be a conflict of interest and I don't want to step into the arena.
>
> The only thing I would suggest you have provided responses to the allegations in the bundle. It may be of assistance to you if you refer to that document when going through your evidence so that you can perhaps, erm, extend on what you've said or offer further explanations, but the point you made about the questions as to why Pupil A has said what he said because of a leading question, that probably is something that— that would fall really under a closing submission. Erm, but obviously it's a matter for you. You— as I say, we'll give you the leeway at the moment to carry on, erm, but it might— might be helpful to look at that response document that you did and— and explore further that particular point you made there."

Therefore, given the Appellant complains that the PCP were insufficiently 'inquisitorial' in not exploring matters in his favour, it is striking the Chair actually overruled an objection from the Presenting Officer about the Appellant reading out in evidence what he wanted to say and reminded him of his own evidence.

44. The Appellant continued with his opening statement, turning to Pupil B, saying:

> "[H]e gives a detailed report on how I brushed sand off Pupil A with a corner of a towel. So, you would think this would be a key point for Pupil A to report but he doesn't mention it. The Pupils say they discussed it together on a number of occasions and yet, in spite of this, there are such significant differences in the two accounts. In the account from both pupils, they say they didn't think anything of it at the time. Well, these pupils were not six or seven years old, they were 12, and I suggest that at 12, if your teacher enters your bedroom and tells you to remove all your clothing, you would not think this is perfectly normal behaviour. I think it's significant in the case of Pupil B that he said he didn't think anything of it at the time, and he'd mentioned when questioned he has not heard anything to change his mind about this. So, he still doesn't think anything of it."

45. Then the Appellant's opening statement turned to Pupil D. He was stopped by the Chair from making observations about Pupil D's health in public session (although the Chair said he could return to this in submissions, which he did), but the Chair then helped elicit the Appellant's evidence about Pupil D's allegations themselves:

> "*Chair*: You said in your statement, in relation to Pupil D, that you did not recall him on the incident, erm, and then to go on to say if he approached me, I'd have provided appropriate assistance to him, such as replacing bed linen. Erm, so really, I think in terms of your evidence, if we start with Pupil D… You say in your statement that you do not recall him or the incident. Is that your evidence today?
>
> *AB* It is. I mean, I'm— I'm sorry that I don't— I don't recall him. Erm, he says that we met on a number of occasions. I'd suggest that this was probably the first one because he was quite young at the time. Erm, but, erm, you know, I saw so many pupils on various courses – I used to do two of these courses at least a year – erm, and, erm, you know, I— I don't have a memory of him at all, I'm afraid.
>
> *Chair:* No. And you have no memory of the, erm, alleged incident as described by Pupil D?
>
> *AB:* Not— not at all. I don't suggest that he wouldn't have come to me if there was a problem in the night, erm, and I don't suggest that I wouldn't have helped him. Erm, but I see his accusations as being wild accusations, and I totally reject what he— his— his version of what happened."

The Chair also asked the Appellant several questions eliciting his evidence in response to the allegations by Pupils A and B. For example:

> "*Chair*: And again, just to confirm you state that at no time did you ask either of them to remove clothing. Erm, and again, just for the sake of you giving evidence, confirm that that is correct?
>
> *AB*: That's absolutely true. I didn't ask them to remove any clothing."

46. The Appellant was then cross-examined by the Presenting Officer. That was extremely detailed and takes up almost 40 pages of transcript. It included this passage of general comments about the three TRA witnesses:

> "*HQ*…Yes, Mr Bruce, and for the avoidance of doubt, I completely appreciate you firstly say Pupil A and B give different accounts… Pupil A suggested that as a Year 7 pupil, he wouldn't necessarily challenge a teacher because they're in a position of power. Now, as a Year 7 pupil, that's not really an unusual thing to say, is it, Mr Bruce?
>
> *AB* It's not particularly unusual but you get complete, erm, scales of differences with how people react in these situations. My recollection of Pupil A was that he was not backwards in coming forwards, shall we say.
>
> *HQ* Now Pupil B described you as nice, welcoming, open to conversation. Essentially, he described you very much as a good teacher. Again, in terms of Pupil B, is there anything you recall in your mind an incident or event, that may be a reason why Pupil B has some sort of malice towards you?
>
> *AB* No…..

HQ [In an interview at School] you simply say Pupil A is a reasonable guy. Is it therefore fair to say that there was nothing that you could, erm, recollect as a source of malice for Pupil A either?

AB That's absolutely the case, yes. 'Guy' is not a word I use. He may have been 'a reasonable chap' or 'reasonable person', 'boy'. It's one of a few transcript errors here. But anyway, yes, I certainly hold that view.

HQ Now, Mr Bruce, as you understand, this Panel have to ascertain, on balance, whether the allegations are proven or not. Now do you accept if these allegations are proven, a scenario where a teacher has seen pupils naked, erm, touched Pupil D in a certain manner, do you accept that would be serious misconduct?

AB I do.

HQ And do you accept that as a teacher with your experience in 2004 and 2015/16, would know that it would be inappropriate acting that way towards a pupil?

AB Yes."

47. Later in the cross-examination, the Presenting Officer explored the 1990 issue with the Appellant, who accepted that concerns had been raised by boys about showering, amongst other things, which had a degree of similarity with Pupil A and B's allegations about 2016. Parts of the 1990 headteacher's notes were put to him:

"*HQ*: And you will see under the bit [of the notes] that is redacted we have the words, "*Other incidents: stares in showers and bathrooms*." Again, would you agree that that seems very similar to what Pupil A is saying happened in 2015?

AB Well, there are similarities but the— the thing I would say is that in those days, the whole bathing set up was completely different. So, they were open bathrooms, erm, there were no dividing cubicles, the boys shared a bath. Erm, in those days they weren't even allowed in the bathroom without a member of staff present. It was a very different whole, you know, regime and we were gradually moving away from that, probably too slowly.

HQ: [the headteacher's notes add]: '*Don't touch duvets or stay near a bed. Don't stay long in bathrooms or go in shower. Get torch that works*'. Do you recall that advice being given in that conversation?

AB No. I do recall that we had a conversation about how we could do the whole process better and I do recall using the occasion to push again for, erm, shower cubicles as opposed to open bathrooms, but I'm afraid that is as much as I can recall about this matter…"

48. In the Presenting Officer's closing statement, of relevance to Allegation 2, she both made short submissions on hearsay and addressed the 1990 evidence:

"You have some hearsay in the Bundle from individuals you have not heard from in these proceedings and therefore, you've not been able to test that. This Panel is able to consider any evidence that is relevant to the case and if it's reasonably fair to do so. So, you can accept hearsay but of course, you may want to consider what weight you place upon that hearsay

> evidence and ascertain whether there is corroborative evidence within the Bundle or you've heard anything from the witnesses, including Mr Bruce, this week that may support that evidence that you have….Panel, I deal with the advice and guidance Allegation 2 in respect of the 1990's and this allegation is proffered mainly on documentary evidence. You have handwritten notes, and I appreciate handwriting can be difficult to understand, but I hope you were assisted in the questioning with Mr Bruce in taking you through those. But what the notes say is that there are concerns raised regarding dormitory checks of a night with Mr Bruce and some additional concerns. There is a concern [he] made a pupil undress in front of him because he had not had a shower and he was told to turn around and face him. Similar conduct to what Pupil A and B say happened. There is a complaint about Mr Bruce and it simply says, "*Stares in the showers and bathrooms*." Again, similar to what Pupil A and D say occurred to them. And it is correct no formal action was taken against Mr Bruce in 1990 but we say that guidance or advice or instruction, whichever word you want to call it, was given…. *"Don't touch duvets or stay near a bed. Don't stay long in bathrooms or go in showers…."* Mr Bruce was given specific warnings which we say he has breached if these allegations are proven…."

49. The Presenting Officer also made submissions on credibility of Pupils A, B and D:

> "When looking at credibility, you may want to consider consistency of accounts and demeanour of the individuals you've heard from. In my submission, the TRA's witnesses were clear and willing to make reasonable concessions. They were frank and— and their demeanour was reasonable to the circumstances seeking, essentially, to assist you as a Panel. You may be asked to consider, in terms of the witnesses, whether a witness has lied and that may be to conceal or falsify information, the questions put to witnesses that were avoided or simply misunderstood. You may think that is relevant in the process. And in terms of that demeanour, physical signs of emotion may or may not be apparent in a witness. Witnesses may display emotions because an innocent person fears being disbelieved or a guilty individual has apprehension about being detected, and they're just a number of reasons that may impact on someone's emotion or demeanour. A more seasoned mistruth teller may be more calm, because it's quite natural to them. It is very different for different people and that is the difficulty that presents when you are assessing demeanour and credibility. It is a matter for the Panel that may be a matter that causes difficulty in your assessments. So, assess carefully the evidence you've heard and come to a reasoned decision on those points….
>
> Now in terms of the discrepancies between Pupil A and B, which has been a big topic throughout this hearing, Pupil A says that he was asked to take— both pupils were asked to take off their boxer shorts. Now he also says that he does not recall what Pupil B was wearing on the lower half. Pupil B provided greater detail in that he says some information Pupil A did not. He says Mr Bruce lifted Pupil A's towel, revealing his naked body. He asked him to spin, which Pupil A did recall in oral evidence but wasn't in his statement and Mr Bruce used the towel to brush and/or wipe Pupil A's back.

Now we say in multiple accounts given from memory can be subject to discrepancies. Again, this could be due to lapse of time or memory. This could be due to the age of the individual and taking that particular statement. Now there is some question regarding Pupil A and B discussing their accounts between themselves or with others at the time they were in school. Now if there is any suggestion to you that Pupil A and B have colluded, surely their accounts would be more lined up, they'd be lined up to a tee to ensure that they essentially got the story straight. On balance, we invite you to accept the reasoning provided by the pupils for understanding that a child who has indicated that something happened to him is trying and/or successfully blocking part of that account from their memory, maybe to protect themselves. The more damaging parts, you will note, in terms of Pupil A are the ones he could not recall, the ones where the physical touch took place. Pupil A says that in 2015/16, he didn't think much about it but clearly by 2018, he thought enough to disclose it to his parents, who then disclosed it to the school. Certainly, he'd recalled it two years earlier and it must have been on his mind. He wanted to forget but he couldn't forget it all. Whereas Pupil B's mind, he says, was still open. He didn't affect him. He had no reason to block anything out and it goes back to how individuals themselves may deal with sit— situations in their own mind and the responses to them can be very different.

And again, there's been much about Pupil A and B's discrepancies but look also at how very much the accounts align. Both pupils say that Mr Bruce came to their room whilst showering. Mr Bruce, of course, accepts that he would go to pupils' rooms on— on some occasions. Both pupils give a similar proximity to where they were all standing in the room. Both pupils say there was some warning or concern about sand and again, Mr Bruce has confirmed the issues surrounding the sand. They both say Pupil B was not wearing, erm, a top at the time and he had no clothes on, erm, from the waist up. They both say Mr Bruce looked them over, either naked or half naked, for sand. So, they say there was some looking in respect of sand but there seems to be some issues as to what they recall each other were wearing. And Mr Bruce acknowledged that he would sometimes go into rooms but on this occasion, we say there was no reason for him to do so. He, in fact, couldn't recall why he did. In 2015 incident, erm, certainly in terms of whatever message was needed to be given to Pupil A in respect of is he showering, is he ready, that could have been relayed at the door…..

Pupil D, in our submission, was a clear, consistent and candid witness before this Panel. He was willing to accept that the police evidence, when he made his first disclosure, is likely to be more accurate. Refresh your mind, Panel, to the [ABE] interview of Pupil D which you have on video but also the private session of his evidence which I don't intend to go into detail given it was heard in private session, but particularly the questions in respect of memory and triggers in respect of Pupil D's account. Now, Pupil D was reasoned and he was confident that he was 100% sure that these events happened. He confirmed the content of his witness statement which states the situation was he was attending a residential trip, which was approximately four days long. He was sleeping in the dormitory, which he showed you on the plan, with other pupils. During the evening or during the

> night, he had wet the bed which he found very embarrassing. He went to seek help from Mr Bruce, who we know was assigned as pastoral, but he was in another room but in close proximity. He had a good relationship and in fact spoke quite highly of Mr Bruce in oral evidence. He described him as positive, in fact, really positive, engaging, light-hearted. And why would Pupil D, sorry, not seek assistance from a trusted adult in that situation? He recalls, but did not know how, except that he would have walked there himself, ending up in Mr Bruce's bathroom where he was asked to take his clothes off. He says Mr Bruce lathered him, in his statement, with soap using both hands but he was drawn to the reference of lotion being used but to him, he said essentially quite bluntly to you, they are the same things in his mind and certainly similar. All he remembers is that it smelt of lavender, which is quite a specific detail that Pupil D recalled….
>
> Now in terms of Pupil D's accounts, again we submit they are consistent. Pupil D gave a statement to the police six years earlier than this week, five years before this TRA statement. And he was quite open to you in saying he hadn't seen that write-up of his account with the police or the sketch since that he had made it six years ago but his account still was consistent."

I will return to some of the Presenting Officer's legal submissions later, as I will to parts of the very detailed advice given to the Panel by its Legal Advisor (although Mr Faux complains that the Adviser rather lost the wood for the trees).

50. Just before that advice was given, the Appellant himself made submissions. He repeated many of the observations in his opening statement on Pupils A and B and repeated his denial of Pupil D's allegations, emphasising again that the Police took no further action. Moreover, he added some observations that Mr Faux highlighted (including Pupil D's mental health in closed session as the Chair earlier suggested):

> "[The Presenting Officer] highlighted…that findings from an earlier investigation were not significant because of the difference in threshold of evidence. Well, there is indeed that difference, but I suggest it is relevant to remember that in the police investigation all my devices were taken and thoroughly searched for anything incriminating, as were printed photo albums with my wife and my daughters and DVDs with family videos. Everything was checked and nothing was found to cause— any concern.
>
> So, I'm genuinely sorry to hear of [Pupil D's] mental health issues and saddened to hear he attribute those, at least in part, to his experience on a course. He talked about these issues and I admire him for being able to open up about them….It sounded to me like he is receiving good help. He described some of his issues and said that these issues, in some form, existed prior to attending the course and he also mentions, although he rode back from it at the end of his testimony, false memory syndrome as an issue. A false memory syndrome is defined as follows. The experience, usually in the context of adult psychotherapy, of seeming— seeming to remember events that never actually occurred. These pseudo memories are often quite vivid and emotionally charged, especially those representing acts of abuse or violence committed against the subject during childhood. Now, when I was arrested and questioned over this issue, my wife and my daughters and I went through a very difficult period while I— while it was investigated

and life for us has not really been the same since, but I think it might have been helpful to know that this serious condition is one of his issues.

There's been reference to advice it is claimed I received back in 1990. As I mentioned under questioning, bathing arrangements were very different in those days. The bathrooms were communal, pupils generally shared a bath. A member of staff was always present in the room. I don't have specific memory of any advice being given. I do remember that the Head and I had conversations and that a number of alterations were made to night-time routine. We all then took a more distant approach to supervision. This matter was subject to a police investigation and no charges were brought against me. And, again, I mention all my devices were taken and they were all examined and there was nothing on them to cause any concern.

This has been an extraordinary stressful time for me personally and I hope you don't mind me saying that and it's taken a huge toll on my wife and three wonderful daughters and I would ask the Panel, therefore, to think very carefully, as I'm sure they will, to remember the following. Pupil A's account differs greatly from that of Pupil B, despite the conferring. Pupil A says he didn't think anything of it at the time. Pupil B was instructed to attend an interview by the way, he didn't volunteer it and he wasn't given any choice. He was called in, in an attempt to verify the account of Pupil A, which he didn't. He too says he didn't think anything of it at the time and most significantly, he still doesn't."

The Professional Conduct Panel's Decision

51. The Professional Conduct Panel ('PCP') then adjourned until the next day when it read out its findings of fact and decision on unacceptable professional conduct before hearing submissions on sanction. I need not set out from its published decision the PCP's observations setting out those participating in the hearing, the allegations, the preliminary applications and the brief summary (only really a list) of the evidence. I will go directly to the PCP's actual findings of fact:

> *"Allegation 1: You engaged in inappropriate and/or unprofessional behaviour towards one or more pupils, including on one or more occasions: a. In or around June — July 2015 entering and/or remaining in the bathroom whilst Pupil A was showering.*
>
> The panel heard evidence from Pupil A that he attended a residential trip to Belgium during which Mr Bruce was a supervising teacher. The shower in Pupil A's hotel room was broken and therefore he needed to use a shower in another pupils' room. Pupil A stated that the shower had a screen that was lightly frosted. Pupil A stated that you could see through the screen. Pupil A, in written evidence, stated that he closed the door whenever he was showering.
>
> Pupil A alleged that whilst he was showering, Mr Bruce would come into the bathroom on multiple occasions and ask if he was showering properly. Pupil A said he knew it was Mr Bruce because he could see him through the screen. Mr Bruce stated in evidence that he would often walk between rooms to encourage pupils to be ready to move on to the next activity, such as getting ready for dinner. In written evidence, Mr Bruce admitted to

putting his head around the door to ensure Pupil A was showering. Mr Bruce commented that he did not linger. In oral evidence, Mr Bruce stated that he did look through the door or the crack to see if Pupil A was showering but did not enter the room.

The panel found that Pupil A's evidence was credible and consistent in terms of the accounts he gave in relation to this allegation. The panel considered the evidence and on the balance of probabilities found that Mr Bruce did look at Pupil A whilst he was showering by opening the door to look inside and therefore concluded that Mr Bruce did enter the bathroom. The panel therefore found that Mr Bruce's actions were inappropriate and unprofessional towards Pupil A and therefore, the panel found allegation 1.a. proved.

1b. In or around June — July 2016 by: i. Entering Pupil A and B's hotel room and asking Pupil A and/or B to remove their towels. ii Telling Pupil A and/or B to face you and/or turn around or words to that effect whilst he was naked or only wearing underwear. iii. Lifted Pupil A's towel away from his body whilst he was drying, exposing his naked lower body; iv. Used a towel to brush and/or wipe down Pupil A's back.

The panel heard evidence from Pupils A and B that they attended a residential trip to Normandy during which Mr Bruce was a supervising teacher. Pupils A and B were sharing a hotel room together.

During the trip the pupils and teachers went to the beach. Mr Bruce told the panel that sand was an issue in the hotel rooms. He asked the pupils to dust the sand off at the beach and to remove the remainder by going straight to their rooms and having a shower.

Pupil B gave evidence that as he was the first in the room he had his shower. After Pupil B finished, he went into the bedroom to towel himself and get changed as Pupil A had his shower. Pupil A stated in evidence that after the shower, he was only wearing his boxer shorts. Mr Bruce came into the room and said that he did not trust that they had cleaned the sand off themselves properly. Pupil A alleges that Mr Bruce told him and Pupil B to remove their clothing so he could check if they had properly cleaned themselves, including being told to remove their boxer shorts. Pupil A stated that both the pupils removed all of their clothing, Mr Bruce looked them over and told them to put their clothes back on. Pupil B stated in evidence that Mr Bruce knocked on the door and Pupil B opened the door inviting Mr Bruce in. Pupil B stated that Pupil A only had a towel wrapped about the lower half of his body with no other clothes on. Pupil B alleges that Mr Bruce asked if they had got the sand off them. Mr Bruce then walked up to Pupil A who was on the other side of the room and lifted a section of Pupil A's towel so that you could see his naked lower body. When Mr Bruce dropped the towel, Pupil A held the towel in one hand and therefore exposing a large section of Pupil A's lower body. Pupil B then alleges that Mr Bruce asked Pupil A to spin in a circle. During the spin, Mr Bruce picked up a section of the towel and gave Pupil A two brushes down the middle of his back. Pupil B also stated that he was asked to take his towel off and check if he had sand on him. Mr Bruce denies that he would walk into a pupils' room

without knocking. He also denies that the allegations occurred as described by Pupils A and B.

The panel note the inconsistencies between the accounts of Pupils A and B. The panel also notes that the events in question occurred seven years ago. Therefore, time may have had an impact on memories. However, the panel has found that the account by Pupil A and Pupil B to be consistent with other statements they have made about the events of 2016.

The panel gave careful consideration of the evidence that it heard in respect to allegation 1.b.iv. Pupil A did not give direct evidence to support this allegation, in the absence of such evidence the panel was not satisfied that the allegation had been proved.

Having considered the oral evidence and the evidence within the bundle, the panel on the balance of probabilities concluded that Mr Bruce:

• did enter into Pupil A's and B's hotel room and ask Pupil A to remove his towel.

• told Pupil A to turn around or words to that effect when he was naked or only wearing underwear.

• lifted Pupil A's towel away from his body exposing his naked lower body.

On the balance of probabilities, the panel found that Mr Bruce's actions were inappropriate and unprofessional, therefore, the panel have found allegation 1.b.i., 1.b.ii., 1.b.iii. proven.

c. In or around June — July 2016 by asking Pupil C to sit on his lap and/or suggesting that he should.

The panel heard evidence from Pupils A and B regarding this allegation. The panel note that no evidence was provided from Pupil C.

Pupil B provided a sketch of the dining area, showing that the pupils in attendance were seated separately. The girls were on one side of the room and the boys on the other, and the teachers sitting separately. Pupil B stated in evidence that Pupil C had got up from his chair to use the toilets. It was during Pupil C's absence that Mr Bruce came over to the boys' table and sat in Pupil C's seat. When Pupil C came back from the toilet, Pupil B's evidence is that Mr Bruce said "come and sit on my lap" to Pupil C. Pupil B witnessed Pupil C sitting on Mr Bruce's knee. Pupil A states that Pupil C was in his chair when he was asked by Mr Bruce to stand up and told Pupil C to sit on his lap. When asked by the panel if the dining area was noisy, Pupil A said there were about 15 boys there but could not say if it was noisy.

Mr Bruce stated that he sat on Pupil C's chair whilst he was in the toilet. When Pupil C came back, Mr Bruce stated that there may have been some banter and he may have acted as a ventriloquist with Pupil C being at his knee but not on his knee or lap. Mr Bruce denies that he asked or suggested to Pupil C to sit on his lap.

The panel accept Pupils A's and B's account that Pupil C was at some point sitting on Mr Bruce's lap. However, the panel on the balance of probabilities was unable to determine if Mr Bruce had asked Pupil C to sit on his lap or

make a suggestion that Pupil C should. Therefore, this allegation is not proved.

d. In or around Easter 2004 by: i. Asking Pupil D to remove his clothes after he had wet the bed. ii. Using your hand to rub and/or apply lotion and/or soap to Pupil D's body and/or genitals. iii. Pulling back the shower curtain and looking at Pupil D whilst showering.

The panel heard from Pupil D about these allegations. The panel were told by Pupil D that in Easter 2004 he attended a residential course. For the duration of the course, it was Pupil D's recollection that Mr Bruce was the musical director. At the time, Pupil D was aged between years old. During the night, Pupil D had wet the bed. He sought assistance from Mr Bruce, who was responsible for a group of boys sleeping in the wing. Pupil D was seeking assistance to change the bed sheets. Pupil D stated that Mr Bruce asked him into his bathroom where he asked Pupil D to take off his clothes, which he did. Once naked, Mr Bruce placed soap on Pupil D's body and in particular his crotch and groin area. Pupil D's evidence was that Mr Bruce touched his genitals when he was cleaning him. Pupil D stated that he remembered that the soap smelled of lavender.

Pupil D stated that he was uncomfortable about the experience at the time and froze up feeling humiliated and embarrassed about the situation. The bedwetting was embarrassing but Mr Bruce's actions made it worse. Pupil D was told by Mr Bruce to stay in the bathroom and Mr Bruce changed the bed sheets during this time. Then Pupil D returned to his bed, cried and rocked himself to sleep.

At some point, Mr Bruce came back around with a torch to make sure that Pupil D was okay. At the time, Pupil D was still crying. Mr Bruce's evidence of this allegation was that he did not remember Pupil D or the incident of Pupil D wetting the bed.

Pupil D's evidence was that the next day, whilst he was taking a shower in the communal washroom, Mr Bruce pulled open the shower curtain and stared at him. Mr Bruce gave evidence that he did not remember this incident. He offered a scenario whereby he may have been checking on Pupil D to see whether or not he required shower gel or shampoo. In such a case he would have passed these through the curtain without looking.

The panel heard that Pupil D has been suffering from mental health issues in his early to mid-twenties. After speaking to a psychiatrist and psychologist, Pupil D attributed his mental health issues to the incidents that occurred in Easter 2004 as set out in his evidence.

Pupil D also explained why he had not reported the incident earlier. Pupil D stated that after speaking to one of his closest friends about the incident and telling his psychiatrist, he reported the matter to the police.

The panel considered Pupil D's oral evidence as compelling. Pupil D gave credible and reliable evidence. The panel found that Pupil D's evidence consistent with no significant changes and was not discredited in any way by Mr Barlow's cross examination. Pupil D explained the delay in coming forward and the panel found this understandable in the circumstances.

> The panel considered the circumstances of the residential trip in respect of this allegation. The panel concluded this was consistent with an educational setting. The panel found that Mr Bruce's actions were inappropriate and unprofessional towards Pupil D and therefore, on the balance of probabilities the panel found allegations 1.d.i., 1.d.ii. and 1.d.iii. proven."

52. The PCP's reasoning on Allegation 2 – the 1990 warning issue – was quite brief, although this is perhaps because it rejected the allegation. Indeed, in reaching that decision, the PCP took into account some of the factors relied on by the Appellant initially in seeking the exclusion of the 1990 evidence at the start of the hearing (and that he reiterated in closing), just as the Chair had explained it may at that time.

> *"2. You behaved as may be found proven at la and/or lb and/or 1c and/or 1d above despite previous advice and/or guidance and/or warnings regarding similar behaviour in or around 1990.*
>
> The panel has carefully considered the written evidence provided to it within the bundle of the notes taken by the headteacher in 1990. Although the panel has found some of the content illegible, it does note that the headteacher wished to talk to Mr Bruce about matters. However, it is unclear what the content of any discussions was with Mr Bruce. The panel has not been provided with minutes of any meeting, nor a formal letter setting out the advice and/or guidance and/or warnings given at the time.
>
> Therefore, on the balance of probabilities the panel find this allegation not proved."

53. Indeed, the PCP's conclusion on 'Allegation 3' (which was actually an inference of sexual motive from the parts of Allegation 1 it upheld) was even more brief:

> *"3. Your behaviour as may be found at la and/or 1 b and/or 1 c and/or 1d above was sexually motivated and/or conduct of a sexual nature.*
>
> The panel has found the allegations 1a,1.b.i, 1.b.ii, 1.b.iii. and 1.d. proven. The panel has considered the facts of allegations 1a, 1.b.i, 1.b.ii, 1.b.iii, and 1.d. individually and has found that Mr Bruce's conduct was in pursuit of sexual gratification. The panel has found that on the balance of probabilities Mr Bruce's behaviour was sexually motivated and was conduct of a sexual nature. Therefore, the panel has found this allegation proved."

54. However, that brief conclusion must be read in the context of the rest of the PCP's decision on misconduct, which I set out in some detail (but I need not do so in full):

> "For those allegations 1.a., 1.b.i., 1.b.ii., 1.b.iii. that post-dates 1 July 2011, the panel was satisfied that the conduct of Mr Bruce, in relation to the facts found proved, involved breaches of the [following] Teachers' Standards….:
>
> • Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by o treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position
>
> • Having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions

> • Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach…
>
> • Teachers must have an understanding of, and always act within, the statutory frameworks setting out…professional duties and responsibilities.
>
> For allegation 1.d. that pre-dates 1 July 2011…prior to the coming into force of Teachers' Standards, the panel had regard to its knowledge and experience of teaching standards at that time and considered the professional relationship between a teacher and pupil is an important one and so is teachers observing proper boundaries, and that Mr Bruce had breached this in his conduct. The panel was satisfied that [his] conduct fell significantly short of the standard of behaviour expected of a teacher.
>
> The panel also considered whether Mr Bruce's conduct displayed behaviours associated with any…offences…The panel found that the offence of sexual activity and voyeurism were relevant. The Advice indicates that where behaviours associated with such an offence exist, a panel is likely to conclude that an individual's conduct would amount to unacceptable professional conduct. Accordingly, the panel was satisfied that Mr Bruce was guilty of unacceptable professional conduct…..
>
> Having found the facts of allegations 1.a., 1.b.i., 1.b.ii., 1.b.iii., and 1.d. proved, the panel further found that Mr Bruce's conduct amounted to both unacceptable professional conduct and conduct that may bring the profession into disrepute. The panel took into account the written character evidence adduced by Mr Bruce."

55. This needs to be read with part of the PCP's recommendation to the Respondent after it had received submissions on sanction from the TRA and the Appellant:

> "In the light of the panel's findings against Mr Bruce, which involved entering a bathroom to see Pupil A showering in 2015. In 2016, telling Pupil A to remove his towel, to turn around whilst he was naked, and moving Pupil A's towel to expose his naked lower body. In 2004, using his hands to apply soap to Pupil D's body and genitals, and pulling the shower curtain whilst Pupil D was showering. The panel found that Mr Bruce did these actions for sexual gratification, that his behaviour was sexually motivated and conduct of a sexual nature….
>
> ..[A] strong public interest consideration in declaring proper standards of conduct in the profession was also present as the conduct found against Mr Bruce was outside that which could reasonably be tolerated.
>
> Whilst there is evidence that Mr Bruce had ability as an educator, the panel considered that the adverse public interest considerations above outweigh any interest in retaining Mr Bruce in the profession, since his behaviour fundamentally breached the standard of conduct expected of a teacher, and he sought to exploit his position of trust…..
>
> Even though some of the behaviour found proved in this case indicated that a prohibition order would be appropriate, taking account of the public interest and the seriousness of the behaviour and the likely harm to the public interest were the teacher be allowed to continue to teach, the panel went on to consider the mitigation offered by the teacher.

There was no evidence that Mr Bruce's actions were not deliberate. There was no evidence to suggest that Mr Bruce was acting under extreme duress, e.g. a physical threat or significant intimidation.

The panel considered the good character evidence provided within the bundle in the form of three letters. Although the panel saw evidence of good character, it noted that in evidence, only the author of the first letter was informed about the allegations in full, the other two individuals only received a précis of the allegations. The panel noted that only the last letter was from a colleague who worked with Mr Bruce at the School and referred to his valuable contribution to the musical and pastoral life of the School, but contained no specific references to his abilities as a teacher.

Mr Bruce has demonstrated no insight or reflection or remorse into his behaviours and actions as found proven. In particular there was no insight into the harm he may have caused Pupils A and D. In particular considering Pupil A stated in evidence that he wishes to forget the experience and Pupil D has suffered in his mental health due to the actions of Mr Bruce.

….The panel was of the view that, applying the standard of the ordinary intelligent citizen, it would not be a proportionate and appropriate response to recommend no prohibition order….The panel was of the view that prohibition was both proportionate and appropriate. The panel decided that the public interest considerations outweighed the interests of Mr Bruce. The sexual nature and voyeuristic behaviours and conduct of Mr Bruce was a significant factor in forming that opinion.

Accordingly, the panel made a recommendation to the Secretary of State that a prohibition order should be imposed with immediate effect. The panel went on to consider whether or not it would be appropriate for it to decide to recommend a review period of the order….

The panel found that Mr Bruce was responsible for:

• entering a bathroom to see Pupil A showering.

• telling Pupil A to remove his towel, to turn around whilst he was naked, and moving Pupil A's towel to expose his naked lower body.

• using his hands to apply soap to Pupil D's body and genitals, and pulling the shower curtain aside whilst Pupil D was showering.

The panel found that Mr Bruce did these actions for sexual gratification, and that his behaviour was sexually motivated and conduct of a sexual nature. The panel believes that this is a case of serious sexual misconduct and sexual misconduct involving a child.

The panel took into account the issue of mitigation, however no significant mitigation was provided for the panel to consider. The lack of insight and genuine remorse shown by Mr Bruce meant that the panel could not be satisfied that there would not be repeated behaviours and/or conduct that could put pupils at risk of harm again.

The panel decided that the findings indicated a situation in which a review period would not be appropriate and, as such, decided that it would be

> proportionate, in all the circumstances, for the prohibition order to be recommended without provisions for a review period."

I need not set out the Respondent's reasons for accepting that recommendation, which, despite Ground 2, Mr Faux accepted were not separately challenged.

Criminal Law Concepts in Regulatory Proceedings (and Grounds 1(b) and 1(c))

56. I address first the relevance to professional regulatory tribunals, including PCPs for teachers, of the principles of procedural and evidential fairness in Criminal Courts. This point featured in many of Mr Faux's submissions. He submitted the 1990 evidence was not just hearsay, but also 'bad character evidence' which should have been excluded as more prejudicial than probative; and that the PCP's legal adviser's directions on 'good character' were inadequate. I would make three observations.

57. Firstly, regulatory proceedings are not 'criminal', either as a matter of domestic law or under Art.6 ECHR, so Criminal Law principles do not apply directly to them. (For example, the standard of proof is now the civil not the criminal standard). This makes sense, since even disciplinary proceedings are not about the imposition of 'punishment'; and the decision-makers are experienced, not untrained juries:

    (a) As a matter of domestic law, there are many statements of the principle that whilst professional regulatory proceedings involve determinations of 'allegations' and 'sanctions', the objective is not punishment of 'offending' as with the Criminal Law but rather public protection. For example, Lord Phillips, when Master of the Rolls, giving the judgment of the Court of Appeal in *Ruscillo v CRHP* [2004] EWCA Civ 1356 observed at [60]:

> **"**'Penalty' is not really an appropriate word to describe disciplinary measures that are imposed under the various regulatory schemes. The primary object of those measures is not to penalise for misconduct. It is to protect the public and the reputation of the profession in question: see the judgment of the Privy Council in *Gupta v General Medical Council* [2002] 1 WLR 1691 at [21]."

That was the context in which Lord Phillips later said in *Ruscillo* at [80]:

> **"**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."

Mr Faux relies on that observation on what he termed the 'inquisitorial role' of the PCP on Grounds 1(d)-(k) and when considering them, I return to the context in *Ruscillo* in which Lord Philips said it. The present point is simply that regulatory proceedings are different in domestic law from criminal proceedings. This is well-illustrated by a case to which I referred Counsel, *Reza v GMC* [1991] 2 WLR 939 (PC). I will return to *Reza* on the 'prejudicial hearsay ground' as one issue in it was whether it was unfairly prejudicial for the same GMC conduct panel to adjudicate in the same hearing two separate sets of allegations of sexual harassment against a doctor: one by some staff and another by some patients. But Lord Lowry also took the opportunity to clarify his own observation only 18 months earlier in *Langford v GMC* [1990] 1 AC 13 (PC) that the Criminal Law 'rule

against duplicity' (individual 'charges' should not 'roll-together' different factual allegations) applied to the GMC. In *Reza*, Lord Lowry said at 944:

> **"**This argument…relied on an assumed analogy with a criminal trial, the validity of which...was seriously called in question by the decision of the House of Lords in *R v. GMC Exp Gee* [1987] 1 WLR. 564."

(It is clear the Privy Council in *Langford* had not been referred to *Gee*). *Reza* shows both that the strict rules in Criminal Courts do not necessarily apply to professional regulatory proceedings and as I discuss later, evidence may be admissible even if it would not be in a Criminal Court. As I also discuss later, a legal adviser's advice to a panel is not the same as a Judge's directions to a Jury, as his advice does not bind the panel and he does not sum-up the evidence: *Fish v GMC* [2012] EWHC 1269 (Admin) at [34].

(b) Art.6 European Convention of Human Rights provides, so far as material:

> "6.1. In the determination of his *civil rights and obligations or of any criminal charge against him*, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….[my italics]
>
> 6.2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 6.3. Everyone charged with a criminal offence has the following minimum rights….
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him…"

In *R v SFA exp Fleurose* [2002] IRLR 297 (CA) (which was not discussed in the hearing in this case but illustrates this uncontroversial point accepted by Mr Faux on behalf of the Appellant), regulatory proceedings – there for a securities trader before the Securities and Futures Authority - were not the 'determination of a criminal charge'. Schiemann LJ said at [13] and [14]:

> "13. We accept, of course, that to be debarred from gaining one's livelihood in an activity in which one has done so for much of one's life is a serious matter. However…we are not persuaded…that the proceedings instituted by the SFA against M Fleurose are properly to be regarded as involving a criminal charge or offence.
>
> 14. [However] it is common ground…the disciplinary tribunal was involved in the determination of M Fleurose's civil rights for the purposes of Article 6. Therefore, clearly, the proceedings had to be fair. We accept…that it was for the SFA to prove their case…[and] to inform M Fleurose in good time of the nature of the charges, he must have adequate time and facilities to prepare his defence, [and] a proper opportunity to give and call evidence and question those witnesses called against him. What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires."

58. Secondly however, *Fleurose* also illustrates that even if professional regulatory proceedings are not 'criminal', they may still require some (if not necessarily all) of the same procedural and evidential fairness safeguards (since those Schiemann LJ listed at [14] also appear in Art.6(3) as 'criminal minimum rights'). However, in *Fleurose* itself, fairness did not require the exclusion of an earlier interview under compulsion even if it would have been prohibited in criminal proceedings by Art.6(2) ECHR. This is because, as Schiemann LJ also said in *Fleurose* at [14], 'what fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence'. This was approved by Lord Dyson in the Supreme Court of [71] of *R(G)*. Indeed, Lord Dyson also noted at [38] that in *Le Compte v Belgium* (1981) 4 EHRR 1, the European Court of Human Rights had accepted professional regulatory proceedings can 'determine civil rights and obligations' so engage the less specific requirements of 'civil fairness' in Art.6(1) ECHR. Likewise at common law, what 'fairness' requires in the professional regulatory context, especially with allegations of 'crimes', may be comparable to what it would require in Criminal Courts, but without the same technical or statutory rules applying directly. So, while Lord Lowry in *Reza* rejected the 'assumed analogy with a criminal trial' and the technical 'rule against duplicity' for the GMC, to ensure fairness in the joinder of charges, he did apply the Criminal principle of 'striking similarity' for 'similar fact evidence' (which predated the 'bad character evidence' provisions in the Criminal Justice Act 2003). He explained at pg.953/957:

> "[I]n cases like the present, as well as those involving more disparate complaints, all the matters alleged will be heard and considered together. This leaves room for the juxtaposition of allegations which, though not qualifying as similar fact evidence, are like enough in character to cause prejudice. This will necessitate a strict warning to the [disciplinary] committee and also, where appropriate, the identification of similar fact principles when the evidence has been given…."

59. Thirdly, however, while Counsel referred me to authorities from a variety of regulatory contexts (e.g. several involving the General Medical Council and Nursing and Midwifery Council alongside teaching cases), the relevance of Criminal Law concepts can depend on the precise terms of the procedural rules for the particular regulatory body, indeed at the particular time. So, for example, until 2013, the General Medical Council (Fitness to Practise) Rules included this rule:

> "The Committee may receive oral, documentary or other evidence of any fact or matter which appears to them relevant to the inquiry into the case before them: provided that, where any fact or matter is tendered as evidence which would not be admissible as such if the proceedings were criminal proceedings in England, the committee shall not receive it unless, after consultation with the legal assessor, they are satisfied their duty of making due inquiry into the case before them makes its reception desirable."

This is why in *Reza*, Lord Lowry spent time considering whether the two sets of allegations of sexual harassment amounted to 'similar fact evidence' under Criminal Law principles and so would be admissible in criminal proceedings. Likewise, in 2011, the Divisional Court in *Bonhoeffer v GMC* [2012] IRLR 37 allowed the appeal from the GMC Fitness to Practise Panel who held it was 'desirable' to admit hearsay evidence which was the 'sole and decisive' evidence of sexual misconduct even though it would not have been admissible in criminal

proceedings under the hearsay rules in the Criminal Justice Act 2003. The Divisional Court held that the willingness of the key witness to give evidence in person or remotely meant that should happen, notwithstanding poorly-evidenced suggestion of risk to him were he to do so. Indeed, *Bonhoeffer* may well have prompted the GMC's removal of the rule quoted above in 2013. So, GMC-related cases decided before 2013, like *Reza* and *Bonhoeffer*, must be applied with some care to different regulatory contexts. As stressed in those cases and *Fleurose*, what fairness requires, whether in domestic law or Art.6(1) ECHR, depends on the case.

60. Against that background, Grounds 1(b) and 1(c) can be swiftly dismissed:

    b. The complaint in Ground 1(b) is that it was unfair to conduct the hearing online as opposed to in-person. However, as I said, in submissions Mr Faux did not really pursue this ground. It was apparent there had been no request by the Appellant for an in-person hearing as the TRA's guidance explains can be done (although the invite letter to the Appellant did not explain he could ask for this, which the TRA may wish to review). However, it cannot be assumed such an appeal would succeed even in a case where a request had been refused. Criminal Courts have long recognised the value of remote evidence. Indeed, since the amendment in 2022 of s.51 of the Criminal Justice Act 2003, even defendants can now appear at trial by live link if that is in the interests of justice: *R v Pierini & Razaq* [2023] EWCA Crim 1189. Indeed, in *Bonhoeffer*, the Divisional Court suggested the key witness could have fairly given evidence remotely from abroad even though he gave the decisive evidence of allegations of sexual abuse. What matters is fairness.

    c. The complaint in 1(c) is that Pupil D's ABE Interview was not played during the hearing. But the PCP had watched it and there was no request from the Appellant or his appointed advocate to play it during the hearing. It is not common for witnesses (as opposed to juries) to watch ABE interviews even during Criminal trials.

Appeal Ground 1(a): 'The Prejudicial Hearsay Ground'

Preliminary

61. For ease, I repeat this ground of appeal, which Mr Faux called the primary ground:

> "The Respondent's prosecuting authority prepared a bundle containing (and the Panel allowed them to rely on) material which should not have been admitted as its admission was neither fair nor relevant, namely: (i) opinion evidence; (ii) allegations of misconduct not pleaded against the Appellant; (iii) repetitive hearsay evidence in the form of police logs; and (iv) hearsay evidence on past advice given to the Appellant"

As I explained, because (i) is not pursued and (ii) involves hearsay evidence, I have called this 'the prejudicial hearsay ground'. Moreover, whilst (iii) in Mr Faux's skeleton argument suggested the 'repetitive hearsay evidence' was the repeated police logs of Pupil D's account, as Mr Pritchard said, such repeated accounts are not unfair with a live witness, indeed are often the main focus of cross-examination. So, (iii) seems more relevant to the repetitive hearsay evidence of the 1990 allegations, initially in the school records but repeated in the 2018 police statements.

62. On this ground, as discussed above, Mr Faux's essential submissions are that: (I) all this material was prejudicial hearsay and should not have been admitted by the PCP as relevant to allegation 2, which was not cured by the PCP dismissing it; and (II) in any event even if rightly admitted for allegation 2, that hearsay 'consequentially prejudiced' the PCP on allegations 1a-d, as seen in its conduct covered by Grounds 1(d)-(k). What I will call Strands (I) and (II) of this Ground are independent. With 'Strand (I)', if it was unfair to admit the hearsay, the appeal could be allowed even if there had not in fact been 'consequential prejudice'. By contrast, with 'Strand (II)', if the hearsay had caused that to allegations 1a-d, the appeal would succeed even if the hearsay had been rightly admitted on allegation 2.

63. On both strands, as explained, I start with the applicable procedural rules, the Teacher Misconduct Disciplinary Procedures (2018), which state at 4.17-4.19:

> "4.17. The standard of proof is that applicable to civil proceedings, namely, the 'balance of probabilities'. The burden of proof is on the presenting officer. This means that it is for the presenting officer to demonstrate that the facts of the case are more likely to have happened than not.
> 4.18. The panel may admit any evidence, where it is fair to do so, which may reasonably be considered to be relevant to the case.
> 4.19 Evidence not disclosed in accordance with paragraph 4.20 will be admitted only with the permission of the panel at the hearing."

Rules 4.20-4.26 essentially provide that any evidence relied on must be served in advance in a bundle. But Rule 4.22 provides that if there is a dispute about the relevance or admissibility of documents in the bundle the panel should determine it at the start of the main hearing or at a case management hearing (governed by Rules 4.37-4.48) listed before the final hearing, or potentially at that final hearing if the PCP adjourn it. Whilst Mr Faux submitted that to avoid prejudice to the PCP at the main hearing, the admissibility of the hearsay material should have been determined by a different panel at such a 'pre-hearing case management' stage, there was no request for this by the Appellant, nor objection to it by him until the final hearing.

Strand (I): Was it unfair to admit the 'prejudicial hearsay evidence' at all ?

64. On what I am calling 'Strand (I)' of the 'prejudicial hearsay ground', Mr Faux relies mainly on *El-Karout v Nursing and Midwifery Council* [2019] EWHC 28 (Admin), where the NMC's procedural rule was slightly different to the PCP's Rule 4.18 here:

> "Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings…"

In *Enemuwe v NMC* [2015] EWHC 2081 (Admin) at [29] Holman J summarised the effect of this rule (in the course of allowing an appeal on the basis the panel had wrongly taken into account conclusions of an employer's disciplinary investigation)

> "Clearly, one effect of that rule is to enlarge the scope of oral, documentary or other evidence which a Committee can admit even when such evidence would not be admissible in ordinary civil proceedings. But another effect of the rule is clearly to incorporate and emphasise the 'requirements' of both relevance and fairness. Those are 'requirements' and accordingly, as

> it seems to me, one effect of the rule is that the Committee should not admit evidence which is not relevant or which it would be unfair to admit."

Whilst *Enemuwe* was not concerned with 'hearsay', it was central to *El-Karout*, where a midwife was acquitted of stealing medication from two patients who gave evidence at the Crown Court. But the NMC then upheld wider allegations on the civil standard of proof, also relying on hearsay evidence from several other patients. Spencer J raised this and quashed the decision as it was not enough for the NMC to *weigh* the hearsay evidence, as it had been unfair to *admit* it. He relied on some cases on hearsay, including *Bonhoeffer, NMC v Ogbonna* [2010] EWCA Civ 1216 and *Thorneycroft v NMC* [2014] EWHC 1565 (Admin) where Andrew Thomas QC summarised the relevant principles on the *admissibility* of hearsay evidence at [45]:

> "1.1. The admission of the statement of the absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness *before* admitting the evidence.
>
> 1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in balance, but it will not always be a sufficient answer to the objection to admissibility.
>
> 1.3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.
>
> 1.4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that the evidence is demonstrably reliable, or alternatively there would be some means of testing its reliability. [U]nless the Panel is given the necessary information to put the application in its proper context, it will be impossible to perform this balancing exercise."

65. As Mr Faux developed it, his submission on Strand (I) of the 'prejudicial hearsay ground' was that – as in *El-Karout* - it was not enough for the PCP simply to *weigh* the 1990 hearsay evidence and indeed to *dismiss* allegation 2, as it was unfair to *admit* it at all on the *Thorneycroft* principles for similar reasons as Spencer J found in *El-Karout*, especially as the Appellant explicitly objected to that evidence at the start of the hearing. Indeed, anticipating many of Mr Faux's arguments, the Appellant had told the PCP:

> "This case is based on the witness statements and accounts from Pupils A, B and D and on their testimony over the next two days. The issues in the pack relating to 1990 are not really relevant to that case, but I have never even known the names of the complainants back in 1990. They are not appearing in this case. All their evidence, I would suggest, is therefore hearsay. …It's essentially propensity evidence which gives a prejudicial effect and whether that outweighs their probative value. These issues were investigated at the time and no fault was found on my part. There was no action taken against me of any kind. In the chronology, it is claimed I was given advice to do the bathroom supervision. I have to say that is news to

> me and nobody will be giving evidence to say this happened….It seems to me that that is actually significantly prejudicial…."

The prejudicial hearsay evidence comprised not only the pupils' allegations to the School in 1990 and the Headteacher's investigation at the time (which as the Appellant pointed out to the PCP it was not adjudicating), but also the 2018 Police Statements repeating those allegations many years after the event, which the Appellant did not mention but which Mr Faux focused on. Mr Faux submitted all that was not only hearsay evidence which was also the sole evidence of allegation 2, as it alleged sexual misconduct with which the Appellant was not charged, it was also prejudicial 'bad character' evidence the PCP admitted, but with none of the safeguards as existed in Criminal proceedings under the Criminal Justice Act 2003.

66. On the 'bad character' point, I referred Counsel to the Scottish case of *Murphy v General Teaching Council for Scotland* (1997) SC 172, where the Court of Session Inner House (the equivalent of the Court of Appeal) quashed the equivalent of a prohibition order made by the Scottish then-equivalent of the PCP, the GTCS. A teacher was referred to it following his conviction of a sexual offence, but it transpired the GTCS panel's bundle also contained a copy of an earlier Police warning for a broadly similar offence. Lord Justice Clerk Ross said at pg.177D-F:

> "We recognise that in the decision letter, there is nothing to suggest that the disciplinary committee were in fact influenced by their knowledge of the earlier police warning and that they were given adequate directions as to the test which they should apply in determining th[e pleaded] complaint. However, it is axiomatic that, in proceedings of this nature, justice must not merely be done, but must be seen to be done. In our opinion, even though the disciplinary committee may have applied the correct test, justice was not seen to be done because the members of the disciplinary committee had before them material which was irrelevant and which was prejudicial to the appellant. They were never told to disregard that material, and accordingly one cannot exclude the possibility that some, if not all the members of the disciplinary committee were influenced to some extent by that objectionable material. For all these reasons we are satisfied that the decision of the disciplinary committee must be quashed."

67. I go some of the way with Mr Faux. The Respondent's Procedure Rule 4.18 permits a PCP 'to admit any evidence, where it is *fair* to do so, which may reasonably be considered to be *relevant* to the case' (my italics). I accept that, like the NMC's more explicit and detailed rule considered in *Enemuwe* and *El-Karout*, Rule 4.18 (implicitly) requires that for evidence to be admitted, it is not enough for it to be *relevant*, its admission must also be *fair*. I also accept as in *El-Karout*, the fairness of admitting hearsay evidence is distinct from weighing it once admitted. Moreover, the evidence of the allegations and 'warning' in 1990 was hearsay evidence because the contents of documents were being relied upon by the TRA to prove the truth of the matter they stated. Furthermore, I accept the fact the PCP did not uphold allegation 2 is not a simple answer to Strand (I), because of the risk as in *Murphy* of the 1990 evidence prejudicing the PCP on the other allegations 1a-d (indeed which Mr Faux submits as Strand (II) actually happened, as I consider below). The risk is the sort of reasoning by the PCP Lord Lowry described in *Reza* at pg.957:

> "[W]here the evidence tends to prove an offence very similar to that which is charged, particularly if the conduct is of a perverted or addictive nature, when the natural reaction is to conclude that, if the accused is 'that sort of person' he is guilty of one offence if guilty of the other and therefore, in mutual corroboration cases, guilty of both or all, as the case may be. Hence the search for similar fact evidence (most frequently in connection with sexual cases)…to distinguish cases where it is fair to adduce the evidence of other offences from those in which that evidence would create unfair prejudice. The conflict is always between judicial caution in the interests of the accused and admission of evidence..common sense and logic….indicate to be relevant. The decision has been rightly called a question of degree."

68. Nevertheless, it is important to remember what allegation 2 was and what the TRA was relying on the 1990 evidence to prove. This was not a case like *Murphy* where a panel were inadvertently shown prejudicial material but not told to disregard it. The PCP here were actually tasked in part with adjudicating allegation 2 which was:

> "You behaved as may be found proven at la and/or 1 b and/or l c and/or 1d above despite previous advice and/or guidance and/or warnings regarding similar behaviour in or around 1990."

So, the allegation was not the Appellant *in fact* behaved similarly previously, but that he had been *warned* about doing so, as the Presenting Officer said in opening:

> "In terms of relevance, you will be drawn to Allegation 2 [which alleges] the behaviour at 1a, 1b, 1c and 1d occurred essentially despite previous advice or guidance or warnings regarding similar behaviour in or around 1990. So, in terms of the documentation relating to 1990, *we are not asking you to make findings that that conduct occurred*. That information is relevant in the sense that there were concerns raised in 1990 and you need to be aware of those concerns as to whether it was similar conduct to what is being placed before you in terms of A, B and D. You then need to ascertain if a warning was given in respect of that conduct…." (my italics)

Therefore, the hearsay evidence relating to the 1990 allegations (including the 2018 Police statements) was not being proffered to prove the truth of the 1990 allegations as such, but rather the asserted fact that the Appellant had 'advice and/or guidance and/or warnings regarding similar behaviour in or around 1990', namely that:

> "No touching duvets or going close to a bed and the minimum length of time in a dormitory. Don't stay long in bathrooms or go in showers."

The PCP's legal advisor's very brief advice needs to be understood in that context:

> "I have no formal advice to give on the allegations of whether…it is prejudicial or not. However, this is the case that the TRA has brought…it is for the TRA to prove on the balance of probabilities, that Allegation 2 has been proven. So, I believe that we would be right to commence…"

Whilst this advice could have been clearer, the legal adviser was in effect saying the 1990 evidence was directly relevant to allegation 2, which was part of the TRA's case and which it would have to prove. That was also in effect what the Chair explained to the Appellant in giving the PCP's preliminary ruling on his objection:

> "*We do not feel that it is prejudicial at this stage*. Obviously, as I stressed to you earlier on, when you come to give your evidence, you can give evidence to that effect and make representations, which the Panel will decide upon, and I would stress, obviously, that the onus of proving these allegations rests upon the TRA. If the Panel feel that they have not met that requirement, then obviously the Panel has the power to dismiss the allegation. *But for the purpose of this application, at this stage, the Panel does not take the view that it is prejudicial to proceed…"* (my italics).

69. In short, the PCP ruled fairness did not require the hearsay evidence to be excluded because the Appellant could address it in his own evidence. Indeed, since it was not tendered to prove the 1990 allegations as such, but only the warning, I agree with Mr Pritchard it was not true 'bad character' evidence as such; or even if it was, it was fair to admit and to weigh it against other evidence. Neither he nor Mr Faux mentioned the 'bad character' provisions of the Criminal Justice Act 2003 ('CJA') doubtless as they do not apply here, but out of fairness to the Appellant, I have cross-checked the position here against them:

    (a) Firstly, the evidence about the 1990 allegations and warning was not 'bad character evidence'. By analogy with s.98 CJA, the hearsay evidence 'had to do with the alleged facts of the offence charged' i.e. allegation 2. Indeed, it was not even an offence or other 'reprehensible behaviour' under s.112 CJA i.e. culpable or blameworthy: *R v Renda* [2006] 1 WLR 2948 (CA)). Instead, it was evidence of guidance, advice or of a 'warning' (but not a disciplinary 'warning') given by the Headteacher who plainly considered the allegations a misunderstanding. It was a very long way from *Murray.*

    (b) Secondly, even if the evidence of the 1990 allegations and warning was 'bad character evidence', as Mr Pritchard said, it was not deployed as 'similar fact evidence' as in *Reza* (or in the modern terminology of s.101(1)(d) and s.103 CJA 2003 'propensity' evidence: see *R v Mitchell* [2016] 3 WLR 1405 (SC)). As Mr Pritchard submitted, the Appellant was not cross-examined on the basis the 1990 allegations were *true*, but rather that the 'advice' about not staying long in bathrooms or going into the shower was relevant to Pupil A, B and D's allegations. This was not propensity evidence that 'you did it before and so you have done it again'. If necessary to fit it into the rubric of 'bad character evidence' in s.101 CJA 2003 (which I do not accept), it was 'important explanatory evidence' or 'relevant to a matter in issue' between the TRA and Appellant, i.e. to rebut any potential innocent explanation that in 2004 or 2015/2016 he did not realise that seeing boys naked was inappropriate.

    (c) Thirdly, even if (which I do not accept) the evidence of the 1990 allegations and warning was strictly 'propensity evidence' under s.103 CJA as in *Mitchell* (or common law 'similar fact evidence' as in *Reza*), it was fair to admit it given the 'significant similarities' and its prejudicial effect was outweighed by its probative value in rebutting innocent explanations about allegations 1a-d, especially as the Presenting Officer made clear the TRA did not invite findings on the allegations reported to the School themselves, only allegation 2 itself: that the Appellant was warned about such conduct.

I am conscious of Lord Kerr's warning in *Mitchell* at [53] that bad character evidence if not controlled can skew the fairness of a trial and I accept that can happen in regulatory cases. But here it did not: the PCP here rejected allegation 2.

70. Whilst the 1990 allegation and warning evidence was not in my judgment 'bad character evidence' (or if it was it was fair to admit it), it was clearly hearsay evidence. But that does not mean it should have been excluded as in *El-Karout* and *Bonhoeffer*, as it was very different both in its nature and effect. It was not the sole or decisive evidence of the main allegation against a professional as in *Bonhoeffer*, nor did it replace the live evidence of witnesses prepared to give it (as in *Bonhoeffer*) or who declined to do so (as in *El-Karout*). Instead, this was evidence not about the 1990 allegations as such, but about a conversation as a consequence which the Appellant had with his Headteacher in 1990. It would be impractical to call the latter about that and the Appellant could respond to it as the only live witness. Unlike the unsatisfactory hearsay evidence in *El-Karout*, the Appellant's evidence in response would enable the PCP to test the reliability of the 1990 hearsay evidence: as it was not about the *allegations* but about the *warning*. This may have seemed like a pedantic distinction to the Appellant, but it was a valid one. Also, allegation 2 was parasitic on at least part of allegation 1 being proved: so, if no part of allegation 1 was proved, allegation 2 (and 3) fell away. Therefore, as Mr Pritchard submitted, the point of allegation 2 was not to help prove allegation 1, but to determine whether any part of allegation 1 that was proven to have occurred in 2004 or 2015/2016 was aggravated by the 1990 warning. Therefore, applying the *Thorneycroft* criteria, the hearsay evidence of the 1990 allegations was admissible:

    (a) The admission of the hearsay evidence was not instead of a specific witness giving evidence who could be cross-examined. It was more akin to documentary hearsay of a topic on which the Appellant could give evidence which could be weighed against it. Whilst that will not always be sufficient to justify admissibility, given the limited use of the evidence, that was fair.

    (b) Even if the hearsay evidence did replace oral evidence of a witness, it was impracticable to expect a headteacher from 30 years earlier to give live evidence about a subject he had recorded in contemporaneous notes. Those notes were not deployed to prove the truth of the allegations mentioned as such, so the natural reluctance to admit anonymous hearsay evidence did not arise (c.f. *White & Turner v NMC* [2014] EWHC 540 (Admin) at [15]).

    (c) Whilst the hearsay evidence was the sole and decisive evidence of allegation 2, it was parasitic on the partial success of allegation 1 at least in part, which was based on live evidence. As the hearsay proved the Appellant was spoken to and given guidance after the 1990 allegations – which indeed he did not really dispute (only that it was *disciplinary*), it was demonstrably reliable.

    It was not unfair to admit the hearsay evidence of the 1990 allegations and warning.

71. Indeed, whilst Strand (I) of the 'prejudicial hearsay ground' is targeted at the admission of the hearsay evidence, not its weighing, it was fair for Mr Pritchard to point out that it does not appear the PCP were ever referred to the 'repetitious hearsay' in the 2018 Police statements, despite the Chair saying at the start of the hearing he 'struggled to find any evidence' of the 1990 warning. Moreover, the PCP was also given much more detailed guidance on hearsay before their final decision. I have already quoted the Presenting Officer's closing remarks on the hearsay

evidence which reminded the PCP that it had not been tested in cross-examination like the live evidence of witnesses like Pupils A, B and D had been. Likewise, the Legal Adviser referred explicitly to both *El-Karout* and *Thorneycroft* and added:

> "I would advise that in reaching its determination, the Panel gives consideration to the relative weight it places on the evidence before it. So in considering hearsay evidence, the Panel should take account of the fact that the person who is the direct source of the evidence is not before it and, therefore, the Panel has not had the opportunity to question or assess that person's credibility. Equally, the evidence was not tested by cross-examination and thus the Panel has not had the opportunity to see how it withstood that form of challenge. The Panel must, therefore, consider whether the evidence is relevant and whether it would be fair for such evidence to be admitted. If admitted, hearsay evidence should be treated with caution giving it close scrutiny to determine its reliability and compatibility with factors presented in other evidence. The Panel will then decide what weight, if any, should be attached to such evidence when making its findings of fact…..If admitted, hearsay evidence will usually carry less weight than evidence that has been tested. However, there is no rule of law that prevents the Panel from relying upon hearsay solely or to a decisive degree if it is satisfied with the strength of that evidence. Similarly, the Panel may feel greater weight should be attributed to witness evidence that has been tested orally before it compared to the witness evidence of those who have not been called to give evidence and, therefore, which the Panel has not had the opportunity to directly challenge."

Moreover, the PCP took into account that caution about weighing the evidence, especially in its handwritten documentary form, in rejecting allegation 2. As it said:

> "The panel has carefully considered the written evidence provided within the bundle of the notes taken by the headteacher in 1990. Although the panel has found some of the content illegible, it does note the headteacher wished to talk to Mr Bruce about matters. However, it is unclear what the content of any discussions was with Mr Bruce. The panel has not been provided with minutes of any meeting, nor a formal letter setting out the advice and/or guidance and/or warnings given at the time. Therefore, on the balance of probabilities the panel find this allegation not proved."

Therefore, I do not accept that it was 'wrong' or a 'procedural irregularity' for the PCP to admit the 'prejudicial hearsay evidence' at the start of the hearing. Moreover, as the hearing progressed, its 'prejudicial effect' was carefully focussed on allegation 2, which the PCP, having received detailed advice, rejected. Therefore, I do not accept that the PCP saw hearsay evidence which should not have been admitted and it is clear the PCP were perfectly capable of weighing it alongside other evidence and did so, reaching a conclusion on it favourable to the Appellant.

Strand (II): 'Consequential Prejudice' of the Hearsay Evidence

72. As I explained, Strand (II) of Ground 1(a) is a distinct issue even if admission of the hearsay was fair as I have found. Mr Faux submitted it caused this 'consequential prejudice' on allegations 1a-d in Grounds 1(d)-(n) (I will address Ground 1(l) later):

d. The Panel failed to adopt an inquisitorial approach and did not explore aspects of the teacher's evidence to establish the nature of his work as a boarding master and the requirement, throughout his career, to supervise children washing, including presence when they were in a state of undress.

e. The PCP failed to adopt an inquisitorial approach and did not inquire into the teacher's wider personal life, insofar as that was relevant to the allegation that he was sexually attracted to young children.

f. The Panel failed to adopt an inquisitorial approach and did not, upon learning of Pupil D's assertion that he was under treatment for 'false memory syndrome', seek out medical evidence, the disclosure of which may have assisted their inquiry.

g. In any event, the Panel failed to account for, or take sufficient account, of Pupil D's description of being under treatment for false memory syndrome.

h. The Panel took no…sufficient, account of the Appellant's good character.

i. The Panel took no, or no sufficient account, of the results of police examination of the Appellant's electronic devices.

j. The Panel took no, or no sufficient account, of positive testimonial evidence.

k. The Panel took no account of the inherent unlikeliness of a heterosexual teacher of good character acting in a sexual manner towards male children when considering whether the standard of proof had been met.

m. The PCP wholly failed to give adequate explanation as to: i) how it arrived at its conclusions on the facts; ii) how the standard and burden of proof was applied; iii) how sexual motive was inferred from the facts it found proved.

n. The Panel failed to take proper account of the delay, in part occasioned by the slowness of the TRA's processes.

73. I will consider the merits of those individual grounds later but there is a short answer to Mr Faux's 'consequential prejudice' argument in Strand (II) of Ground (a). As a matter of common sense, since the hearsay evidence of the 1990 allegations and warning *did not* prejudice the Appellant on allegation 2 (to which it directly related but which was rejected by the PCP), it seems extremely unlikely it *did* prejudice the Appellant on allegations 1a-d (to which the hearsay did not refer). If Mr Faux can persuade me that some or all of those individual grounds of appeal (many of which overlap and will be considered together) should succeed, in which case he does not need the 'consequential prejudice' point. If he cannot do so, it is quite difficult to see where it gets the Appellant, because then the alleged 'prejudice' would not have led to a 'wrong' decision or a 'procedural irregularity' by the PCP. This may explain, as Mr Pritchard fairly said, why the 'consequential prejudice' point was never part of the Appellant's original grounds of appeal drafted by Mr Faux. However, even leaving aside that point, there is simply no evidence whatsoever the PCP was 'prejudiced' by the hearsay in any of the ways in Grounds 1(d)-(g) or (m):

(d) There is no evidence the PCP's approach to the eliciting of the Appellant's evidence about supervising children was affected by the hearsay evidence (indeed they did not find he had been warned about it earlier in his career).

(e) The same applies to this sub-ground as to (d).

(f) As I shall explain below, sub-ground (f) is based upon a misunderstanding of Pupil's D's evidence about 'false memory syndrome', but again it is difficult to see how hearsay evidence about the 1990 allegations actually affected the PCP's approach to Pupil D's evidence about memory and his 2004 allegations as such.

(g) The same applies to this sub-ground as to (f).

(m) Mr Faux did not really argue what he called the insufficiency of the PCP's reasons in various respects were related to its admission of the hearsay evidence and frankly it is difficult to see how logically it was relevant to the reasons issue.

74. I accept that with Ground 1(n), the admission of the hearsay evidence of the 1990 allegations and warning clearly exacerbated the issue of delay, in that the Appellant had to recall events not just from 20 years before as with Pupil D, but over 30 years before. However, whilst the PCP did not explicitly refer to that delay as a reason for rejecting allegation 2, it did take into account the lack of clarity in the hearsay evidence from that time, in not finding that the Appellant had been 'warned' in 1990, let alone guilty of any allegations. Therefore, there was no direct prejudice from the delay. Given that, it is difficult to see how the hearsay can have caused 'consequential prejudice' to the PCP's treatment of delay on allegations 1a-d. However, I will return to the issue of delay more generally under Ground 1(n).

75. By contrast, on Grounds 1(h), (i), (j), (k), I do accept that the hearsay evidence of the 1990 allegations and warning was capable of prejudicing the PCP's approach to its findings on allegations 1a-d – namely on the weight it placed on the Appellant's 'good character', testimonials, absence of incriminating evidence from the Police investigation and 'inherent unlikelihood' of those allegations. Nevertheless, in my judgement, there was no unfair prejudice on Grounds 1(h)-(k) from that hearsay:

75.1 Firstly, the Appellant's argument on Grounds (h), (i), (j) and (k) is that the PCP took no sufficient account of his good character, testimonials, personal life and the absence of incriminating evidence on his electronic devices. However, the PCP did specifically address the Appellant's good character and testimonials:

> "The panel considered the good character evidence provided within the bundle in the form of three letters. Although the panel saw evidence of good character, it noted that in evidence, only the author of the first letter was informed about the allegations in full, the other two individuals only received a précis of the allegations. The panel noted that only the last letter was from a colleague who worked with Mr Bruce at the School and referred to his valuable contribution to the musical and pastoral life of the School, but [it] contained no specific references to his abilities as a teacher."

The PCP's analysis seems uninfluenced by the hearsay – for example it does not mention that the references are weakened by lack of knowledge of any instructions (even if not a 'warning') by the Headteacher in 1990. Therefore, there is no evidence of 'consequential prejudice' here as alleged in 'Strand (II)'.

75.2 Secondly, even if one considers whether there is a risk the PCP were implicitly influenced by the hearsay evidence in the ways suggested in Grounds 1(h), (i), (j) and (k), it is common for judicial and quasi-judicial bodies to leave aside some information if irrelevant to a particular legal decision: so-called 'mental gymnastics'. Of course, Juries are not trained or experienced in this, but with a

professional decision-maker, as Lord Lowry explained in *Reza* at pgs.945-946, the test is whether the reasonable and fair-minded observer familiar with the procedure would have had a reasonable suspicion of a likelihood of bias or prejudice (whether conscious or subconscious) such that a fair trial was not possible. (This test is more apposite to Strand (II) than whether there is a real risk the PCP relied on evidence that should not in fairness have been admitted: *Ogbonna v NMC* [2010] EWCA Civ 1216 at [30], as I have rejected that contention in Strand (I))). Here, in my view the reasonable observer would not have been concerned. As in *Reza*, the PCP showed it could differentiate between charges: upholding some but dismissing others, including allegation 2 to which the hearsay evidence was most obviously relevant. If the hearsay had prejudiced the PCP against the Appellant, one would have expected it to have upheld allegation 2 (and indeed allegations 1biv and c which it also dismissed).

75.3 Thirdly, even if (despite the absence of evidence of this and plenty of evidence to the contrary) the PCP did take into account the hearsay evidence as weighing against or diluting the evidence of the Appellant's good character and/or of increasing the inherent likelihood of him being guilty of allegations 1a-d, that was not unfair in any event. As I discuss in more detail later in addressing Grounds 1(h), (i) and (j) substantively, the weight of 'good character' evidence and directions about it must be realistic and tailored to the circumstances, as does the 'inherent probability' of someone being guilty of particular misconduct. In my judgement, whilst there was no evidence the PCP did so, it would not have been unfair for it to have taken into account the 1990 hearsay evidence (allegations of inappropriate behaviour and a warning not to approach boys' beds or showers) as relevant to how much weight it attached to the Appellant's good character and the inherent unlikelihood of him as a married man having a sexual interest in boys. This case was very different than *Murphy*, where the PCP's decision was quashed because the PCP had not been told to disregard not just highly prejudicial but also totally *irrelevant* evidence; or *Emenuwe*, where the NMC wrongly adopted an employer's decision in upholding particular allegations rather than reaching its own independent view as it should have done. In *Georgiev v NMC* [2017] SC EDIN 12, Sheriff Walsh QC distinguished both *Murphy* and *Emenuwe*, because he was satisfied that in *Georgiev* itself, the NMC had reached their own independent view on an allegation of fraudulent registration as a nurse, despite taking into account an earlier NMC decision of fraudulent registration as a midwife. Whilst the present issue is obviously very different, the PCP here also reached an entirely independent view from the TRA: rejecting allegations 1biv and 1c and 2 itself: (which I have laboured in saying was the allegation linked to the hearsay).

For those reasons, I do not accept the 1990 hearsay evidence 'consequentially prejudiced' the PCP on the decisions criticised in Grounds 1(h), (i), (j) or (k) either. Therefore, I dismiss the whole of the main ground of appeal, Ground 1(a), both on 'Strand (I)' as originally pleaded and 'Strand (II)' developed in submissions. I now turn to the second group of Grounds - 1(d)-(n) - aside from any 'prejudicial hearsay'.

Grounds (d)-(n): Did the PCP err in fact-finding and fail to act inquisitorially ?

76. As explained earlier, quite aside from the admission and effect of the hearsay evidence on allegation 2 challenged in Ground 1(a) (and the PCP's analysis of sexual motivation on allegation 3 challenged in Grounds 1(l) and (m)(iii)), the PCP's findings of fact in allegations 1a-d are also challenged by Grounds 1(d)-(n). With some of them, it is also suggested the PCP failed to act 'inquisitorially'. Given the overlap between Grounds 1(d)-(n), they can be analysed under three headings:

    (1) Grounds 1(d), (e), (h), (i), (j) and (k) all relate to the Appellant's good character and some to the PCP's failure to investigate it 'inquisitorially', but are also linked to the PCP's reasons on the burden and standard of proof in Ground 1(m);

    (2) Grounds 1(f) and (g) relate to alleged weaknesses in Pupil D's evidence and the PCP's failure to investigate it 'inquisitorially', along with Ground 1(m) on the sufficiency of the PCP's reasons for accepting the evidence of all three Pupils;

    (3) Ground 1(n) concerns the effect of delay on the evidence of all the witnesses.

    However, before turning to those three headings, I will first briefly review the correct approach to appeals on credibility and fact-finding (including reasons), then the authorities on the suggested 'inquisitorial' approach in regulatory proceedings.

Appeals against Findings of Fact and Reasons for Factual Findings

77. There is much judicial guidance on how to approach appeals on credibility and findings of fact. One of the most authoritative (though unrelated to the professional regulatory field) is now *Henderson v Foxworth* [2014] 1 WLR 2600 (SC), where Lord Reed considered the expression 'plainly wrong' at [61], [62] and [67]:

> "61 [The Court below] also cited…Lord Macmillan in *Thomas v Thomas* [1947] AC 484, 491, where, after mentioning some specific errors which might justify the intervention of an appellate court, his Lordship added that the trial judge may be shown 'otherwise to have gone plainly wrong'….
>
> 62 Given that the [Court below] correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached…
>
> 67 It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

78. *Volpi v Volpi* [2022] 4 WLR 48 (CA) is another case from outside the professional regulatory field. But it was cited by Ritchie J in *Roach v GMC* [2024] EWHC 1114

(Admin) in his review of authority at [15]-[34], which explained how 'wrong' under CPR 52.21(3) even on findings of fact is wider than '*Wednesbury* unreasonable'. In *Volpi*, Lewison LJ drew together the threads on factual appeals at [2](i)-(iv):

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable…."

79. The same approach has been taken in the professional regulatory field. Also cited in *Roach*, in *Gupta v GMC* [2002] 1 WLR 1691 (PC), Lord Rodger said at [10]:

> "…[A]ppeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not

> recalled…. In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position.

Similarly, in *GMC v Jagjivan* [2017] 1 WLR 4438 at [40] the Divisional Court said in the context of a 'review-type appeal' by the GMC from a Fitness to Practice Panel under s.40A Medical Act 1983 (albeit it said 'rehearings' under s.40 were similar):

> "i)…A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity'….
>
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'…
>
> iii) The court will correct material errors of fact and of law…Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing…
>
> iv) [In] what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
>
> v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, [it] will approach Tribunal determinations about whether conduct is serious misconduct; or impairs a person's fitness to practise; and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see…*Khan v GPC* [2017] 1 WLR 169 [36]…
>
> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court 'is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself

> and thus attach less weight to the expertise of the Tribunal …': see...*Khan* at [36(c)]. As Lord Millett observed in *Ghosh v GMC* [2001] 1 WLR 1915 at 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances."

80. Subject to that, the approach of Morris J (as he now is) to credibility in a teacher rehearing-type appeal in *O v SSE* [2014] EWHC 22 (Admin) at [58] remains valid:

> "58. Where the decision below depends on preferring the account of X over that of Y on the basis of reliability and credibility, including an assessment of demeanour, I have considered *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, *Mubarak v General Medical Council* [2008] EWHC 2830 (Admin) (citing *Gupta….*) and *In the matter of F (Children)* [2012] EWCA Civ 828 (as well as *Cheatle* [*v GMC* [2009] EWHC 645 (Admin)] §15). The position can be summarised as follows:
>
> (1) The appellate court will be reluctant to interfere with the findings of fact made by the lower court or tribunal: *Cheatle,* §§15, 23 to 28.
>
> (2) There are different schools of thought as to significance of demeanour; on the one hand, the lower court is best placed to assess credibility, because it has had the opportunity to assess demeanour. On the other hand, [it] is not necessarily a good or best test of credibility and is question of feel, which may be unreliable: compare *Mubarak* §5 with *Cheatle* §23.
>
> (3) However, the predominant view is that demeanour is a significant factor. For example, the assessment, as genuine, of a witness' distress when giving evidence can be a sound foundation for a finding of truthfulness: *Re F* §44.
>
> (4) Thus, the starting position is that the lower court is in a better position to assess credibility and reliability of witnesses….*Mubarak* §5…
>
> (5) However, the appellate court may reach a different conclusion if the circumstances so justify. Demeanour is not conclusive, and it may be that the advantage of having seen and heard the witnesses is not sufficient to explain or justify the conclusion of the court below: see *Mubarak* §6…
>
> (6) There will always be inconsistencies of detail in the evidence of witnesses. The task is to the consider whether the *core* allegations are true: see *Mubarak* §20 and *Re F* §45."
>
> Finally, to the extent that there is...tension between *Mubarak* and *Cheatle* I…will adopt the somewhat more interventionist approach [in] *Cheatle."*

So, in *O* itself, Morris J (as he now is) dismissed various challenges to a PCP's factual finding that a teacher developed a sexually-motivated relationship with a pupil whose evidence the PCP had (rightly) preferred to the teacher's. Morris J held the PCP had been entitled to rely on various aspects of the pupil's evidence as supporting her credibility including: corroboration by another pupil; her willingness to give evidence but lack of motivation to lie; the detail and consistency of the core of her account even with minor inconsistencies; and by comparison the more significant inconsistencies in the teacher's own evidence. Another factor the PCP were entitled to rely on with credibility was the demeanour of the pupil when giving

evidence even by video link and even though the teacher gave evidence by phone. This shows demeanour can be *part of* the material with which to decide credibility.

81. By comparison, in other cases the Court has overturned findings *excessively* based on the demeanour of witnesses. In *Suddock v NMC* [2015] EWHC 3612 (Admin), Andrews J (as she then was) found that the disciplinary panel had gone wrong in placing too much reliance on what it considered to be the positive demeanour of the NMC's witnesses and the negative demeanour of the appellant who had represented herself and came across badly. However, *Suddock* was an extremely unusual case where Andrews J found there was clear evidence of someone at the appellant's former work trying to frame her, which the NMC panel had simply not addressed. In *R(Dutta) v GMC* [2020] EWHC 1974 (Admin), Warby J (as he then was) found the Fitness to Practise Panel had been 'wrong' to accept the evidence of a key witness against the doctor, on a factual basis not canvassed in the evidence. It had also accepted her credibility based on her demeanour in oral evidence and only then asking if she was contradicted by documents. This risked placing undue reliance on flawed memory, especially with events many years earlier, as famously discussed by Lord Leggatt in *Gestmin v Credit Suisse* [2013] EWHC 3650 (Comm). This approach has been followed in *Khan v GMC* [2021] EWHC 374 (Admin). But given Mr Faux's submission that *Khan* showed it was impermissible to make general observations about witness credibility before making findings of fact (which judges everywhere do every day), I would stress in both *Dutta* and *Khan*, the problem was not that as such, but rather the panel placing *undue reliance* on witness' demeanour and *insufficient reliance* on contemporary documents. Moreover, that was because there were crucial documents in *Dutta*, *Khan* and indeed *Gestmin*. But the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 recognised that will not always be the case and when crucial events are unrecorded, it is necessary to assess all the evidence and that demeanour has a part to play in that (as also stated in *O v SSE*).

82. Another 'gateway' to challenge factual or credibility findings, as Ritchie J explained in *Roach*, is challenging the sufficiency of the reasons for the findings. In *Gupta*, Lord Rodger explained that whilst a GMC Panel had a common law duty to give reasons as to why it found serious professional misconduct and for sanctions, it had no *general* duty to give reasons for findings of fact. But he added at [13]:

> "Their Lordships…have rejected… that there is a general duty to give reasons in cases where the essential issue is….the credibility or reliability of the evidence in the case. None the less…the committee can always give reasons, if it considers it appropriate to do so in a particular case….[T]here may indeed be cases where the principle of fairness may require the committee to give reasons for their decision even on matters of fact."

Indeed, in *Southall v GMC* [2010] EWCA Civ 407, Leveson LJ recognised that what the Privy Council in *Gupta* in 2001 had considered 'exceptional' may have become common given developments in the common law duty to give reasons, driven by Art.6(1) ECHR, in *English v Emery Reimbold* [2002] 1 WLR 2409 (CA). Leveson LJ noted whilst the Privy Council in *Gupta* had refrained from suggesting when the duty to give reasons on fact-finding arose, Sir Mark Potter P at [106] of *Phipps v GMC* [2006] EWCA Civ 397 had suggested it did so where 'without reasons, it will not be clear to the losing party why he has lost', but it would be unnecessary where the reason for findings would be 'otherwise plain or obvious'.

In *Southall*, Leveson LJ elaborated on that slightly at [55]-[56], in the course of holding that case was sufficiently complex that the panel's reasons were inadequate:

> "[I]n straightforward cases, setting out the facts to be proved…and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why….When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different."

83. Once again, the review of authority on the duty to give reasons in *O* at [59]-[64] is invaluable. But I need only quote (as did Ritchie J in *Roach*) Morris J's (as he now is) recent summary in *Byrne v GMC* [2021] EWHC 2237 (Admin) at [26]-[27]:

> "26. As regards reasons concerning the credibility of witnesses:
>
> (1) Where there is a dispute of fact involving a choice as to the credibility of competing accounts of two witnesses, the adequacy of reasons given will vary. In *English*, Lord Phillips stated that 'it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts or the other give answers which demonstrated that his recollection could not be relied upon'. On the other hand, *Southall* at §55, and *Gupta* at §13 and 14 suggest that even such limited reasons are not necessarily required in every case.
>
> (2) Secondly, whilst…it is a common practice in tribunal decisions on fact, there is no requirement for the disciplinary body to make, at the outset of its determination, a general comparative assessment of the credibility of the principal witnesses. Indeed, such a practice, undertaken without reference to the specific allegations, has been the subject of recent criticism in *Dutta.*
>
> [I interpose to stress what I have already said: that both *Dutta* and indeed *Khan* were really concerned about privileging demeanour over documents. Morris J continued with an observation with which I respectfully agree:]…. In my judgment, consideration of credibility by reference to the specific allegations made is an approach which is, at least, equally appropriate.
>
> 27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to 'identify reasons for the judge's conclusions which cogently justify' the judge's decision even if the judge did not himself clearly identify all those reasons."

84. On that last point about evaluating the reasons in context, in my judgement, it must also be legitimate to read the panel's reasons in the light of the advice they were given by their legal adviser: as Julian Knowles J said of good character directions in *Khan v GMC* at [92], to which I return below. On a related subject, as I mentioned earlier, in *Fish v GMC* [2012] EWHC 1269 (Admin), Foskett J discussed how to

approach challenges to legal advice to a panel. Of course, in the Crown Court, that could give rise to an appeal on grounds of 'misdirection'. However, Foskett J noted a line of authority rejecting that analogy with the Crown Court for legal advice to a professional regulatory panel, from *Libman v GMC* [1972] AC 217 (PC), *R(Campbell) v GMC* [2005] EWCA Civ 250 and *Gopakumar v GMC* [2008] EWCA Civ 309. Foskett J summarised the question to be asked in *Fish* at [33]:

> "So unfettered by any criminal analogy was there anything wrong with the legal assessors direction in this case ? Was it unfair ? Does it cast doubt upon the Panel's decision ?"

The PCP's Suggested 'Inquisitorial Role'

85. By comparison to the abundant judicial guidance on factual and reasons appeals, judicial observations about the 'inquisitorial' approach of professional regulatory tribunals are few and far between and do not always speak with one voice. Once again, this may depend on the particular procedural rules for the particular regulator. In the present context, the PCP's procedural rules state at para.4.49 that:

> "Subject to paragraphs 4.50 - 4.56 and 4.73 - 4.74 [the PCP's duties to proceed at the start of the hearing with a standard explanation and its duties at the end in relation to its decision-making], the procedure at the panel hearing will be determined by the chair, who will direct the parties to adopt an investigative rather than an adversarial approach."

By contrast, in the NMC case of *Suddock*, Andrews J rejected the appellant's complaints of procedural unfairness by the panel on the basis that it had not assisted her sufficiently when she had represented herself. Andrews J said at [39] and [42]:

> "The disciplinary process is an adversarial one. It was a matter for the NMC to decide what evidence it chose to rely upon to prove the charges... It was entitled to select the witnesses it intended to call. It took the risk that it would be unable to prove the charges and in some cases it failed to do so. If Ms Suddock wished to adduce evidence from other witnesses, or documentary evidence, to support her version of events there was nothing to stop her. If the documents in question were not available to her, but were within the NMC's possession or control and were relevant, it was under an obligation to disclose them to her. If it failed to do so, her remedy was to seek an order from the panel compelling their production…. The NMC cannot be blamed for failing to call witnesses who might have supported Ms Suddock. It was under no obligation to do so and its failure…did not make the disciplinary process unfair. Nor can it be blamed for Ms Suddock's failure to ask the panel to admit hearsay evidence."

Yet other judges suggest other professional regulatory panels are 'inquisitorial'. So, in *Towuaghantse v GMC* [2021] EWHC 681 (Admin), Mostyn J held a Coroner's verdict criticising a doctor's care of a newborn child was admissible in GMC proceedings as the evidential principle that Coroner decisions were inadmissible in later civil litigation 'did not apply to inquisitorial proceedings'. He said at [31]:

> "Regulatory proceedings of the type with which I am concerned are quintessentially inquisitorial. So, the rule [against admissibility of Coroner verdicts] does not apply to them. This is put beyond doubt by the General Medical Council (Fitness to Practise) Rules Order of Council 2004…

> R.34(1) which provides that: "The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law".

However, I would respectfully observe that just because such a rule disapplies the Courts' normal rules of evidential admissibility (including the recondite one discussed in *Towuaghantse* that did not feature in *Enemuwe* or *Georgieva* despite potentially arising in them), that does not necessarily mean the distinction between 'inquisitorial' and 'adversarial' is 'binary' in all contexts. As discussed, the evidential rules of the GMC and other professional regulators are very different from rules in Criminal Courts, which are perhaps the epitome of a classic 'adversarial' jurisdiction, just as Coroners are the epitome of an 'inquisitorial' jurisdiction (although they also have juries). Nevertheless, as Andrews J explained in *Suddock*, there are distinctly 'adversarial' elements of regulatory proceedings.

86. To my mind, it is revealing that neither para. 4.49 of the PCP Rules, which says the Chair will 'direct *the parties* (not the panel) to adopt an *investigative* not an adversarial approach', nor the observation Mr Faux relies on for his submission that the PCP has an 'inquisitorial' role, use that actual word. As quoted earlier, at [80] of *Ruscillo v CRHP* [2004] EWCA Civ 1356, Lord Philips said a 'disciplinary tribunal should play a *more proactive role* than a judge presiding over a criminal trial'. But it was in the different context of the Council for Healthcare Professionals appealing 'under-prosecuted' or 'unduly lenient' decisions. Lord Phillips said:

> "79. Where a defendant is prosecuted for a crime the precise charge or charges and the evidence relied upon to support them are matters for the prosecution. The defence can make admissions. Prosecution and defence can agree facts. The procedure is adversarial and the judge plays a passive role in the factual inquiry. If the defendant is convicted the judge sentences him for the offences of which he has been convicted in the light of the evidence that has been given at the trial.
>
> 80. The procedures for disciplinary proceedings under the various statutes …are not identical. In general, they involve a preliminary investigation of conduct of the practitioner [under] complaint…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."

87. In truth, many judicial proceedings fall somewhere on a spectrum between the exemplars of an 'adversarial' jurisdiction (the Criminal Courts) and an 'inquisitorial' one (the Coroner). Debate about a tribunal's 'inquisitorial' role usually arises with assisting litigants-in-person, as the Appellant was before the PCP. For example, in Civil Courts, CPR 3.1A provides that with litigants-in-person:

> "(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.

> (5) At any hearing where the court is taking evidence this may include- (a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and (b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper."

A previous version of the Equal Treatment Bench Book referred to judges 'adopting to the extent necessary an inquisitorial role to enable the litigant-in-person fully to present their case'. However, in *Rea v Rea* [2022] EWCA Civ 195 Snowden LJ at [81] clarified CPR 3.1A(5) did not allow a judge to act as an inquisitor in evidence:

> "…[T]he suggestion that the judge might adopt an inquisitorial role can be understood as a suggestion that the judge might actively question the LIP during the openings at the start of the trial, as a means of teasing out what the LIP's case really is. But this has nothing to do with the judge acting as an inquisitor of witnesses during the subsequent evidential phase of a trial."

88. Indeed, similar observations have been made even about an Employment Tribunal ('ET'), different than a Civil Court because of Rule 41 Rules of Procedure 2013:

> "The tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair having regard to the principles contained in the overriding objective….[It] shall seek to avoid undue formality and may itself question the parties or any witness so far as appropriate in order to clarify the issues or elicit the evidence. [It] is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."

If anything, this goes even further than para. 4.49 for the PCP here, because it actually empowers the ET to ask questions 'so far as appropriate to clarify the issues or elicit the evidence', in a way which might 'raise eyebrows in civil courts' as Langstaff J, then President of the Employment Appeal Tribunal, put it at [31] of *East of England Ambulance Service v Sanders* [2015] ICR 293 (EAT). But as he also explained at [29]-[30], that does not mean an ET is 'inquisitorial':

> "29 Rule 41 does not… allow a tribunal to make inquiries on its own behalf into evidence which was never volunteered by either party. [It] may, in an appropriate case, ask the parties whether they have thought about particular evidence, or even possibly whether in an appropriate case the parties or one of them would wish an adjournment in order to obtain it. But it is not, as the Employment Judge appeared to think, for the [ET] itself to investigate the evidence and rely on its own investigations. The tribunal is…to act as the adjudicator not as advocate. Actively seeking fresh evidence on one or other party's behalf is inevitably likely to lead towards the latter.

> 30…It is important that the obligations of a tribunal to deal sensitively with litigants in person and those who may be vulnerable for one reason or another, not least through mental illness, should not be confused with adopting an inquisitorial procedure."

89. In my judgment, the fact that professional regulatory disciplinary panels are 'more proactive' than a judge in a Crown Court trial does not mean they are 'inquisitorial' like a Coroner. Para.4.49 of the PCP Rules explains the Chair will direct the parties, not the panel itself, to adopt an investigative not adversarial approach, which seems less concerned with imposing an investigative duty on the panel and more concerned with preventing aggressive adversarial litigation by the parties themselves. However, disciplinary panels may be 'more proactive' in a case involving a litigant-in-person than in a case where both sides are represented. Like Employment Tribunals and Civil Judges, such panels may assist a litigant-in-person to set out and articulate their case and may even ask questions during the evidence of that litigant and/or of witnesses for the regulator to ensure there is a fair hearing. But that is a very long way from acting 'inquisitorially', or taking over questioning of an opposing witness in a way preventing a litigant-in-person from questioning them as in *Rea*, let alone a panel conducting its own research in the absence of the parties as in *Sanders*. To return to the principles discussed and bearing in mind the fundamental requirement for a 'fair hearing' at common law and under Art.6(1) ECHR - what ultimately matters is the fairness of the hearing. So, I turn to the three sub-groups of Grounds 1(d), (e), (h), (i), (j) and (k) on 'good character'; 1(f), (g) and (m) on 'credibility of complainants' and 1(n) on 'delay'.

Grounds (d)-(e), (h)-(k) and (m): The Appellant's Good Character and PCPs Reasons

90. The thread running through all these grounds is the Appellant's complaint that the PCP failed to attach sufficient weight to his good character in various ways: by failing to adopt an inquisitorial approach to investigate his requirement to supervise children washing in a state of undress (Ground 1(d)); or to investigate or take into account his personal life (Ground 1(e)); or to direct itself on his good character (Ground 1(h)); including his positive testimonial evidence (Ground 1(j)); and the absence of incriminating evidence on devices examined by Police (Ground 1(i)); or ultimately to take into account in applying the standard of proof the inherent improbability that he as a heterosexual teacher of good character acted in a sexual manner towards boys (Grounds 1(k) and (m)(ii)). I have re-ordered them to illustrate Mr Faux's overarching submission on 'good character': that the PCP failed to take it sufficiently into account not only during the hearing, but also in the legal adviser's directions and PCP's decision that was 'wrong' or a 'serious procedural irregularity'

91. However, Mr Faux's overarching submission starts running into difficulty as soon as one starts reading the transcript of the PCP hearing. As I have detailed above, when the Appellant came to give evidence, the Chair Mr Ward: (i) permitted the Appellant to read out an opening statement, despite objection from the Presenting Officer; (ii) indeed encouraged the Appellant continue when he offered to stop; then (iii) asked him several questions to elicit and clarify his evidence relating to Pupils A, B and D. Also, during the Appellant's closing submissions, the Chair went into private session to enable him to make submissions about Pupil D's mental health and the impact on his reliability. The Chair worked diligently during the hearing to enable the Appellant to say everything he wanted to say and to clarify his evidence.

92. I turn to Ground 1(d), that: '*The Panel failed to adopt an inquisitorial approach and did not explore aspects of the teacher's evidence to establish the nature of his work as a boarding master and the requirement, throughout his career, to supervise children washing, including presence when they were in a state of undress'*. However, this does not align with the Appellant's evidence, especially relating to 1990. He actually said in cross-examination that back then *'boys were not allowed in the bathroom without a member of staff present. It was a very different regime and we were gradually moving away from that, probably too slowly'*. In his closing statement said after 1990 *'we all then took a more distant approach to supervision'*. So, he was not saying there was a requirement *throughout his career* to supervise children washing: only before 1990. In any event, given allegation 2 was that he had been warned in 1990 for inappropriate conduct, the PCP were wise not to probe this too deeply with him which could have felt like they were cross-examining him. Moreover, the Chair specifically asked the Appellant about Pupil D's allegations and he said he did not recall any incident, so the PCP can hardly be blamed for not exploring this further. Likewise, on Pupils A and B, the Appellant had given a detailed account about both 2015 and 2016 in his 2017 response to the School and 2024 response to the TRA. The PCP cannot realistically have been expected to 'explore' with him his supervision routine further, especially as it had changed after 1990. Therefore, even if the PCP had an 'inquisitorial role' (which I do not accept), the Chair fully discharged it with the Appellant. Therefore, I dismiss Ground 1(d).

93. I can deal briefly with Ground 1(e): '*The PCP failed to adopt an inquisitorial approach and did not inquire into the teacher's wider personal life, insofar as that was relevant to the allegation that he was sexually attracted to young children'*. As in *Suddock*, the Appellant (who started the hearing by making detailed submissions on evidential admissibility) was perfectly capable of giving more detailed evidence if he wished about his personal life. In fact, he only appears to have mentioned his family in his closing submissions. I do not criticise that, but indeed the PCP could have been criticised if they had started asking questions about the Appellant's private life – for all they knew, this could have been a very sensitive subject. Therefore, this ground is also not made out and I dismiss Ground 1(e).

94. I next set out the legal adviser's advice on good character which Mr Faux criticised:

> "The Panel should have in mind the evidence of the teacher's character and consider *whether such evidence has any bearing on the teacher's credibility or propensity* to have carried out the alleged facts or to the circumstances in which the teacher found himself." (my italics).

However, the legal adviser returned to this issue in his last direction on misconduct:

> "The Panel have seen three pieces of written evidence that the teacher is of good character. The Panel may consider *whether such a statement has any bearing on the teacher's credibility or propensity* to have carried out the alleged facts or the circumstances in which the teacher found himself. *If the Panel does not consider the statement of any such relevance, any evidence of the teacher's general good character is not relevant to the question of culpability either when considering whether the allegations have been proven to the relevant standard* and nor when considering the issues of unacceptable professional conduct and/or conduct that may bring the profession into disrepute." (my italics)

Moreover, the Presenting Officer had suggested the PCP consider the knowledge of the writers of the reference as to the allegations; and I will repeat what the PCP said:

> "The panel considered the good character evidence provided within the bundle in the form of three letters. Although the panel saw evidence of good character, it noted that in evidence, only the author of the first letter was informed about the allegations in full, the other two individuals only received a précis of the allegations. The panel noted that only the last letter was from a colleague who worked with Mr Bruce at the School and referred to his valuable contribution to the musical and pastoral life of the School, but [it] contained no specific references to his abilities as a teacher."

95. Ground 1(j) '*The Panel took no, or no sufficient account, of positive testimonial evidence'* does not mention this reasoning by the PCP, presumably because they said it in their recommendation to the Respondent, as opposed to their earlier decision on the facts and conduct. However, as Mr Faux accepted, even at that earlier stage they said they 'took into account' the testimonial evidence. Clearly, the PCP simply elaborated what it had meant later. The PCP gave clear and cogent reasons for not feeling able to place much weight on the testimonial evidence that was neither 'wrong' nor a 'serious procedural irregularity': I dismiss Ground 1(j).

96. Ground 1(i) '*The Panel took no, or no sufficient account, of the results of police examination of the Appellant's electronic devices'* relies on the fact the Appellant mentioned in his closing submissions that the Police had checked his electronic devices and printed photo albums and that nothing incriminating was found. However, as Mr Pritchard pointed out, the Police evidence to that effect was before the PCP who were reminded of it at length by the Appellant himself. Moreover, as Mr Pritchard pointed out on Ground 1(m) on reasons, in *O* Morris J (as he now is) pointed out at [59(3))] that a PCP does not have *'to deal with every argument nor explain every factor in its reasoning'* and it is *'sufficient that his reason show the parties the basis on which it has acted'*. Lewison LJ made a similar point in *Volpi* at [2(iv)]. The fact the PCP did not mention the absence of incriminating evidence on the Appellant's devices does not mean that it did not take that point into account. However, the PCP can hardly be blamed for not mentioning it specifically: the Appellant was interviewed and his devices examined in late 2017. The main allegation against him dated to 2004 and the others to 2015 and 2016 and even 1990. This was not a case like *O* where there were said to be incriminating online communications between a teacher and child. The PCP may well have thought this was not a particularly significant point and that view would not have been 'wrong' or a 'serious procedural irregularity'. Therefore I dismiss Ground 1(i).

97. Ground 1(h) is simple to state but rather more complicated to consider: '*The Panel took no, or no sufficient, account of the Appellant's good character'.* Whilst very briefly stated in his skeleton, as Mr Faux developed it in submissions, this Ground also has two strands, although I can address it much more briefly than Ground 1(a). The first strand is Mr Faux's criticism of the legal advice the adviser gave the panel, which he describes as 'perfunctory and wrong'. The second strand is that he submits the PCP did not address good character in their decision at all. In fact, that latter concern is misplaced. As I have explained, the PCP did address the testimonial evidence of the Appellant's good character but placed limited weight on it for valid

reasons. However, it is true the PCP did not explicitly direct themselves on good character, whether in the terms of the legal adviser's advice or in any other way.

98. On the legal adviser's advice, I certainly accept his direction is not a 'full good character direction' like this example from the 'Crown Court Compendium', as it did not say the Appellant's good character *should be taken into account in his favour*

> "You have heard that D has no previous convictions. Good character is not a defence to the charge(s) but it is relevant in two ways. First, the defendant has given evidence. D's good character is a positive feature you should take into account in D's favour when considering whether you accept what D told you. Secondly, the fact D has not offended in the past may make it less likely that D acted as the prosecution alleges in this case. What importance you attach to D's good character and the extent to which it assists on the facts of this particular case are for you to decide. In making that assessment you may take account of everything you have heard about D."

However, as the Crown Court Compendium also explains, that direction should be 'tailored' to the particular circumstances, to avoid giving a direction contrary to common-sense: *R v Aziz* [1996] AC 41 (HL). The same point was made about a '*Lucas* Direction' (considered in Ground 1(l) below) in *Fish* by Foskett J at [86]: *'where advice based on Lucas is given, it needs to be relevant to the issues in the case and fashioned accordingly'*. Moreover, in *Khan*, Knowles J said at [92]:

> "Whilst a disciplinary tribunal must take good character evidence into account in its assessment of credibility and propensity…and…it is an error not to do so, it is not required slavishly in its reasons to give a self-direction to that effect (although if it does do so, there can be no room for argument) … It is sufficient, where the matter is raised on appeal, if the appeal court is able to infer from all the material that the Tribunal must have taken good character properly into account."

99. Applying the test about the impact of legal adviser directions to panels in professional regulatory proceedings of Foskett J in *Fish* at [33], I would conclude 'there was nothing wrong' with the adviser's 'good character direction' in this case: it was 'fair' and it 'does not cast doubt' on the PCP's decision for three reasons:

    (a) Firstly, as explained, the authorities like *Khan* and *Fish* show that one cannot expect the legal adviser's advice to a professional panel to be in precisely the same form as a Crown Court direction. In any event, that instructs Juries the weight of good character is a matter for them. That was essentially what the legal adviser was saying here. A professional panel do not need instructing that good character is advantageous to a registrant. Therefore, in my judgment, the adviser's direction was perfectly fair.

    (b) Secondly, even if I am wrong about that, as the Crown Court Compendium explains, in the Crown Court there are multiple categories of 'good character direction' and that it must be tailored if the Prosecution are relying on bad character evidence. Here, as discussed, even if the hearsay evidence relating to the 1990 allegations and warning was not strictly 'bad character evidence', it would have made little sense for the legal adviser to give the PCP a Crown-Court-style 'full good character direction' whilst at the same time directing the PCP that the TRA sought a finding that the Appellant had

been previously warned for similar behaviour, which would then mean he would not be of 'good character' in the strict sense. Indeed, one even might have started getting into 'cross-admissibility', when these directions were already quite legalistic. Therefore, the legal adviser's direction was not unfair in not directing the PCP to take good character into account in the Appellant's favour, as that would depend on their decision on allegation 2.

(c) Thirdly, as emphasised in *Fish*, the real issue is not whether the legal adviser's direction was legally impeccable but whether 'doubt is cast' on the PCP's own decision. Here, the PCP may not have given itself a direction on good character, but as made clear in *Khan*, it does not have to do so. It would have had the adviser's directions on good character in mind and specifically and fairly addressed the testimonial evidence. Therefore, it is clear the PCP had good character sufficiently in mind, even if not as prominently as the Appellant may have wished. That was not unfair, it was entirely legitimate.

Therefore, I dismiss Ground 1(h) as well.

100. On the 'good character' topic, this leaves Grounds 1(k) and (m(ii)), which I will consider together: '*The Panel took no account of the inherent unlikeliness of a heterosexual teacher of good character acting in a sexual manner towards male children when considering whether the standard of proof had been met'* and '*wholly failed to give adequate explanation as to…how the standard and burden of proof was applied…"* Notwithstanding the breadth of the latter, given the PCP explicitly made findings on the balance of probabilities (having being directed on the burden and standard of proof and indeed directed itself on the burden of proof at the start of the hearing when not excluding the hearsay), Ground 1(m)(ii) is really inextricably linked with Ground 1(k). In short, Mr Faux's submission is that the PCP either failed to give sufficient weight in applying the standard of proof to the inherent improbability of the Appellant as a heterosexual teacher of good character acting sexually inappropriately towards boys; and/or failed to give adequate reasons for its conclusion in that respect. Mr Faux also complains that the legal adviser's advice on the standard of proof was inadequate because it got the law wrong and was insufficiently tailored to the particular circumstances of the case. The adviser said:

> "The more serious the allegation, the less likely it is to have occurred and therefore, the stronger the evidence should be before the Panel before it concludes an allegation has been proved. Sexual motivation is a particularly serious allegation, however, it does not mean it must be proved to a higher standard of probabilities. [But] certain circumstances call for heightened examination of the strength and quality of the evidence which includes the inherent unlikelihood of the occurrence taking place, the seriousness of the allegation and the serious consequences that follow if found proved. It is a matter for the Panel to determine which features apply in this case."

101. Mr Faux submits this fails to reflect the correct approach to the standard of proof explained by Lord Nicholls in *Re H (Standard of Proof)* [1996] AC 563 (HL), 586:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the

> allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have …raped…his under-age stepdaughter than….to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

However, it is not entirely clear in what respect the legal advisor's advice is contrary to Lord Nicholls' guidance in *Re H*. Moreover, if anything, it is over-generous to the Appellant in saying 'the more serious the allegation, the less likely it is to have occurred and therefore the stronger the evidence should be'. That logic was disapproved in *Re B (Standard of Proof)* [2008] 3 WLR 1 (HL), where Lady Hale clarified what Lord Nicholls had meant in *Re H*. She said at [64] and [70] and [72]:

> "Lord Nicholls' nuanced explanation left room for the nostrum 'the more serious the allegation, the more cogent the evidence needed to prove it', to take hold and be repeated time and time again… It is time for us to loosen its grip and give it its quietus……Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies….As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

102. *Re B* – like *Re H* a family case - was more recently applied to the civil context by the Supreme Court in *Shagang v HNA* [2020] 1 WLR 3549. It was also applied in the present context in *Brittain v SSE* (2019) by Lang J who said at [39]-[40]:

> "39 It is clear that civil standard of proof is the same whatever the seriousness of the allegations. Depending on the particular facts of the case an allegation may be inherently improbable and so a tribunal may need more cogent evidence that it occurred. But there is no necessary connection between the seriousness of an allegation and its improbability. It follows

> that a more serious allegation does not require stronger evidence in order to be established; it all depends on the facts of the case.
>
> 40. On the evidence in this case, and in a hearing of this nature, I do not accept that it would have been appropriate for the PCP to take as a starting point the assumption that most teachers do not sexually abuse their students in common areas and therefore the conduct alleged by Pupil A probably did not occur. Rather, the PCP should have had in mind both the burden and standard of proof and approached the evidence adduced without preconceived assumptions. In my judgment, the PCP adopted the correct approach of evaluating the evidence both individually and as a whole."

103. The submission Lang J rejected in *Brittain* seems to have been similar to that by Mr Faux in the present case. As I have explained, if anything the legal adviser's direction to the panel was over-generous to the Appellant. Be that as it may, certainly the legal adviser did not err – and nor did the PCP itself – in not stating explicitly that 'a heterosexual teacher acting in a sexual manner towards boys is inherently unlikely'. Such a self-direction would bluntly fly in the face of reality: sexual abuse in schools – including by married teachers of previous good character – has been and remains tragically all too common. So does sexual abuse within families, as any Criminal or Family Judge knows well. But even just in this case, was sexual conduct by the Appellant towards boys 'inherently unlikely' in 1990 when boys alleged it to the School at the time ? The PCP found there was no warning and were not even asked to find the allegations were true at that time. Was it 'inherently unlikely' in 2004 when Pupil D says it occurred ? The PCP made detailed findings accepting Pupil D's credibility and noted the Appellant had no recollection of any such incident. I will come to the criticisms of the PCP's approach to Pupil D in a moment, but it cannot be said that his account of abuse by a teacher is 'inherently unlikely'. Moreover, if the PCP were entitled to accept the evidence of Pupil D about 2004, then the allegations of Pupils A and B in 2015/2016 were not 'inherently unlikely'. One does not need to wade into the deep waters of 'cross-admissibility' to understand that (and it is not suggested that such a direction to the PCP was needed).

104. Ultimately, as Lang J explained in *Brittain*, what matters is whether the PCP were 'wrong' in their actual findings on all the evidence. In the present case, if the PCP were 'wrong' to accept the evidence of Pupils A, B and D, then their omission explicitly to mention any 'inherent improbability' of the allegations adds little. If they were not 'wrong', that omission cannot realistically undermine that conclusion. The PCP were properly directed on the burden and standard of proof and on good character. They had the advantage of seeing and hearing the witnesses a transcript can never capture. They applied the standard of proof with care, rejecting some allegations but upholding others. They mentioned the testimonial evidence and their omission to explicitly mention the Appellant was a family man; had taught and conducted trips for many years without misconduct (as I have said there were 'complaints'); and the absence of incriminating evidence on his devices did not itself render the findings wrong or unfair. I dismiss Grounds 1(k) and (m)(ii).

Grounds 1(f)-(g)/(m): The PCP's Factual Findings and Reasons on Pupils A, B and D

105. I turn now from the Appellant's complaints about the PCP's approach to his own evidence, to his complaints about the PCP's approach to the evidence of Pupils A, B and D and particularly its acceptance of their credibility. However, as the PCP only partially accepted the evidence of Pupils A and B, the Appellant's main focus is Pupil D. Indeed, since there was no suggestion of collusion or contamination between Pupils A and B on one hand and Pupil D on the other, if the PCP's findings about Pupil D were legitimate, as a matter of common-sense (even aside from 'cross-admissibility'), that supports their conclusions on Pupils A and B.

106. Therefore, I start with Grounds 1(f) and (g), which again I take together: (f): '*The Panel failed to adopt an inquisitorial approach and did not, upon learning of Pupil D's assertion that he was under treatment for 'false memory syndrome', seek out medical evidence, the disclosure of which may have assisted their inquiry'* and (g)*:* '*In any event, the Panel failed to account for, or take sufficient account, of Pupil D's description of being under treatment for false memory syndrome'.* Mr Faux's essential argument under these two Grounds is that the circumstances in which Pupil D related that his 'memory' of the conduct alleged in allegation 1d emerged, both in his statement and his oral evidence, should have prompted the PCP to investigate his medical evidence and to approach his evidence cautiously because he mentioned treatment for 'false memory syndrome'. Mr Faux pointed out that in Pupil D's statement and evidence (which I have quoted above) he said when he was 17 (rather than in 2017), he was receiving psychiatric treatment and the 'memory' of what he now alleges against the Appellant came into his head. However, it was not until 2017, several years later, that he reported his allegations to the Police. Those were that at Easter 2004, aged 9/10, on a course after he wet the bed, the Appellant told him to take off his clothes and rubbed lotion on his naked body, including his genitals; and the next morning watched him showering. In his oral evidence, Pupil D spoke of 'false memory syndrome' and offered to consent to the PCP examining his medical records. However, Mr Faux submitted the PCP not only failed to follow that up and did not address his 'false memory syndrome', it referred to him receiving psychiatric treatment 'in his early-to mid-twenties, rather than as a teenager as Pupil D had actually clarified in evidence. Mr Faux focussed on this key reasoning by the PCP about why it accepted Pupil D's evidence (as opposed to its summary of what his evidence on the allegations had been):

> "The panel heard that Pupil D has been suffering from mental health issues in his early to mid-twenties. After speaking to a psychiatrist and psychologist, Pupil D attributed his mental health issues to the incidents that occurred in Easter 2004 as set out in his evidence.
>
> Pupil D also explained why he had not reported the incident earlier. Pupil D stated that after speaking to one of his closest friends about the incident and telling his psychiatrist, he reported the matter to the police.
>
> The panel considered Pupil D's oral evidence as compelling. Pupil D gave credible and reliable evidence. The panel found that Pupil D's evidence consistent with no significant changes and was not discredited in any way by Mr Barlow's cross examination. Pupil D explained the delay in coming forward and the panel found this understandable in the circumstances.
>
> The panel considered the circumstances of the residential trip in respect of this allegation. The panel concluded this was consistent with an educational

setting. The panel found that Mr Bruce's actions were inappropriate and unprofessional towards Pupil D and therefore, on the balance of probabilities the panel found allegations 1.d.i., 1.d.ii. and 1.d.iii. proven."

107. However, as Mr Pritchard submitted, in reality, Grounds 1(f) and (g) labour under a misapprehension as to what Pupil D actually said in evidence about 'false memory syndrome'. In his statement he mentioned being treated by psychiatrists (he said in 2017, but he clarified in oral evidence actually when he was 17 – i.e. in 2010/11). For convenience, I repeat what Pupil D said in cross-examination by the Appellant's appointed advocate (abbreviated to CB), with my underline for emphasis:

> "*CB*..Have you found that PTSD has affected your memory with things?
>
> *Pupil D*: Erm, no. I think the significant triggers are really obvious to me…. The general specific details with a memory can become, for me, like around like an event, such as the significance of this, erm, so I remember the significant event but, you know, like exact conversations, more specific nuances within that event are harder to remember. One thing that I worked through [with psychiatrists] is the false memory. Erm, you can create false memory by trying to think too hard on those nuances around the significant situation. So— and that could lead to sort of misunderstanding it. So, outside of the— this raw memory that I have… I think she tried to not explore too much around that.
>
> *CB* Right, I just need to understand some more about this false memory. Why were you going through a false memory process with a psychiatrist?
>
> *Pupil D* No, it's discussing how, erm, false memories can be a thing in any— erm, for anyone if they— erm, like so say if I create some confirmation bias around something that I wasn't 100% sure of, then that could result in a false memory at a later date….[T]hese are psychiatric terms or, erm, exercises that were introduced to me. So, rather than myself having anxieties around something like a false memory…These were exercises where…let's not explore too deeply into stuff that's unclear because that…

Then in re-examination, Pupil D was asked and answered this:

> "*HQ*…[H]ow are sure are you that the event in the bathroom, in terms of the touching and lotion or the soap, and the event in the shower the next day occurred, as you put in your statement ?
>
> *Pupil D* I'm 100% sure that these occurred. I have no doubt in my mind that these events occurred. The point I made around memory was of trying to pin down specific— erm, the more specific details that went along with the event, but the actual event did occur."

Therefore, Pupil D did not suggest he had 'false memory syndrome', still less had been treated for it. He specifically corrected the advocate on that point. Pupil D was simply saying that he was conscious that whilst the core of his memory of the event was sure, he was conscious that errors could creep in on specific details. He called this 'false memory syndrome' which psychiatrists had told him about, so he tried not to explore such details too deeply. If anything, Pupil D's awareness of the risk of false memory leant weight to the reliability of his evidence in avoiding that risk.

108. So, the PCP cannot hardly blamed for not investigating Pupil D's medical records about 'false memory syndrome' because he said he did not have it and had not had treatment for it. In any event, as I have explained, the PCP is not a truly 'inquisitorial' jurisdiction like a Coroner. It is not the PCP's role to obtain medical records or ask the TRA for them, especially as the Appellant did not request them as he could have done – just like the registrant in *Suddock* could have requested evidence. Moreover, whilst it is true the PCP mentioned Pupil D saw psychiatrists in his 'early to mid-twenties' and did not mention he saw them when he was aged 17, this is not an error by the PCP, merely a matter of emphasis. Pupil D did see psychiatrists aged 17 but then stopped for a while, before seeing them again in his early to mid-twenties. It was in that second period that he made the allegation about the Appellant, first to a friend and then to the Police. So, it was that second period which really mattered and it was that second period which the PCP mentioned. The PCP found this explained the delay in Pupil D coming forward which they thought was 'understandable in the circumstances'. I will come back to this on Ground 1(n). But in other ways, the PCP's reasoning about Pupil D is not and cannot be criticised in Grounds 1(f) and (g). As the PCP correctly observed, Pupil D's account of his allegation was essentially consistent between the report to the Police in 2017, his ABE interview (which was not played at the hearing but not suggested to be inconsistent), his statement and oral evidence. By the principles summarised in *O*, the PCP had a chance to assess Pupil D's evidence and (unlike *Suddock* and *Dutta*) did not rely excessively on demeanour. I cannot say the PCP's assessment of Pupil D's credibility is 'wrong', still less 'plainly' so. Nor can I say the PCP failed to act in a sufficiently 'inquisitorial' way by failing to take into account 'false memory syndrome' for the reasons I have given. Therefore, I dismiss Grounds 1(f) and 1(g).

109. Next is Ground 1(m)(i): '*The PCP wholly failed to give adequate explanation as to: i) how it arrived at its conclusions on the facts'.* This wide-ranging ground was focussed in Mr Faux's skeleton argument to the following two points:

(a) 'As set out above, in relation to Pupil D's account the Panel's decision… misunderstands his assertions about his own psychiatric treatment and a lack of curiosity regarding the same. There was no proper examination of the teacher's account, other than an observation that he had no recollection of the bed-wetting event. The teacher's evidence regarding the care that would have been offered in those circumstances was ignored. The examination of the case put forward by the Appellant is cursory to non-existent'.

(b) In relation to Pupil A's account of 2015 and Pupil A and B's accounts of 2016, the Panel set out their task by first considering whether the pupils were credible. As per the legal advice they received, such an approach has been discredited (see transcript and ***Khan v GMC***). They attributed the inconsistencies between the two accounts to the passage of time and found both pupils credible.

> They failed to consider at all the circumstances of the initial questioning of both pupils. The factual findings against the Appellant follow from the finding that the pupils were credible rather than from a properly reasoned consideration of all the relevant evidence, for and against the Appellant'.

I address those criticisms in sequence and given what I have already said, briefly.

110. With Pupil D, as Mr Pritchard submitted, the criticism of the PCP's approach to Pupil D's evidence itself adds nothing to Grounds 1(f) and (g) I have already dismissed. Moreover, the criticism of the PCP's 'cursory to non-existent' discussion of the Appellant's evidence is difficult to understand where the Chair specifically asked him and he said that he had no memory of Pupil D or the incident. Even then, in fact the PCP do record more than Mr Faux stated, because they actually said:

> "Mr Bruce's evidence of [1di and ii] was that he did not remember Pupil D or the incident of Pupil D wetting the bed….. Mr Bruce gave evidence that he did not remember [allegation 1diii]. He offered a scenario whereby he may have been checking on Pupil D to see whether or not he required shower gel or shampoo. In such a case he would have passed these through the curtain without looking.

Given the Appellant's limited recollection of events (to which I return on the issue of delay in Ground 1(n) next), it is difficult to see what else the PCP could have realistically said about his evidence. Mr Faux says it should have related his evidence about his 'supervisory practice', family life, long and distinguished career: but that adds nothing to the grounds I have already rejected. The reality is that the point of the burden of proof is that someone in the Appellant's position is entitled to 'put a complainant to proof', which is essentially what the Appellant did. However, his focus in closing submission was not inconsistencies or problems with Pupil D's account, since in reality there were none, as the PCP found. Instead, the Appellant focussed on 'false memory syndrome' which was his misapprehension.

111. On Pupils A and B, I have already addressed Mr Faux's main criticism based on *Khan*, in fact applying *Dutta*. What the legal adviser actually told the PCP was this:

> "As to the credibility of a witness, in *Dutta,* the tribunal had approached a resolution of the central factual dispute by starting with an assessment of the credibility of a witness' uncorroborated evidence about events 10 years earlier and only then went on to consider the significance of unchallenged contemporaneous documentation. The tribunal's assessment of the witness' credibility was based largely, if not exclusively, on her demeanour when giving evidence….The *Dutta* case involved a conflict between a witness' recollection and unchallenged documentation and in that case, Justice Warby held it was an error of principle to ask *"Do we believe the witness?"* before considering the documents and stressed that reliance on a witness' confident demeanour was a discredited method of judicial decision making.
>
> In *Khan v GMC,* the registrant faced allegations of a sexual misconduct made by three complainants, A, C and D. His defence was that the allegations had been fabricated or exaggerated. The tribunal declared

> Witness D, who had been the first witness to complain, to be credible and consistent before it considered any of the evidence that she had given. However, the tribunal had heard evidence from two other witnesses who flatly contradicted Witness D's evidence. The tribunal failed to deal adequately or at all with this conflict…Similarly the tribunal stated that it had found Witness A to be a confident, credible witness before considering any of the allegations in detail. It did not deal with a direct conflict of evidence between her and the police officer to whom she made a complaint.
>
> As to Witness C, who had accepted lying on oath in related proceedings before the employment tribunal and fabricating the contents of an anonymous letter that implicated the registrant, the…tribunal had assessed her demeanour…and found that she has been adamant that she had been truthful in her evidence. Justice Knowles reiterated that reliance on a witness' confident demeanour is a discredited method of judicial decision making, all the more so in the case of a witness who admitted lying on oath.
>
> In the case of *Joseph v GMC*, in considering *Dutta*, the High Court observed *"Where memory is concerned, strength and vividness are not a reliable indicator of accuracy. The process of litigation itself creates biases, emotion and rationalisation…it creates biases, emotion and rationalisation must be allowed for and demeanour is not a sure guide of truthfulness."* The court also considered the case of *Briar v GMC* which confirmed that the best evidence on which to base the factfinding will always be the objective matters shown by contemporaneous documentation. However, it acknowledged that this may not always be available. In such circumstances, it was stated "*Where reliance has to be placed on a witness' recollection, demeanour may, in an appropriate case, be a significant factor."* It went on to say that in a case where the complainant provides an oral account and there is a flat denial from the other person concerned and little or no independent evidence, it is commonplace for there to be inconsistency and confusion in some detail. Nevertheless, the task of the court below is to consider whether the core allegations are true."

I have some sympathy with Mr Faux's complaint that these directions were more of a lecture than a practical direction. But it clearly warned the PCP against over-reliance on demeanour (which is not a criticism of the PCP's reasoning here). It was also perfectly accurate in terms of law. As I have done, the adviser focussed on the concerns in *Dutta*, *Khan* (and in *Joseph*) that excessive weight was given to demeanour, rather than misdescribing those cases (as Mr Faux does) as prohibiting consideration of a witness' reliability before making findings of fact. As I said, many judges do that using documents to give examples of reliability or unreliability before making findings. That was not the complaint in *Dutta*, *Khan* and *Joseph*, which was of accepting a witness' credibility at the start based almost exclusively on demeanour irrespective of other evidence – indeed in *Khan* flatly against it.

112. However, the PCP here did not fall into that error in relation to Pupils A and B. On the contrary, they did not start with a discussion of their demeanour at all, but rather their accounts of the particular allegations, before contrasting those with the account of the Appellant (in detail which he does not complain about). On the 2015 allegation, the PCP did not simply accept Pupil A's account but made a careful finding of fact on the balance of probabilities, broadly accepting it but also

addressing the Appellant's account. On the 2016 allegations, the PCP rightly considered the inconsistencies between Pupils A and B the Appellant identified in his submissions and dismissed two of the five allegations accordingly. However, on the other three allegations, the PCP gave detailed reasons for their findings which reconciled the Pupils' evidence, consistently with each other and other statements, in sufficient detail to satisfy the principles on credibility and reasons in *Gupta, Jagjivan, Southall, Byrne* and *O*. It was entirely clear why the PCP here (partially) accepted the evidence of Pupils A and B. Therefore, I also dismiss Ground 1(m)(i).

Ground 1(n): The Impact of Delay on the Appellant's and the Pupils' Evidence

113. Ground 1(n) states: '*The Panel failed to take proper account of the delay, in part occasioned by the slowness of the TRA's processes'*. As I noted earlier, there was a delay of (over) five years between referral to the TRA in late 2018 and the hearing in early 2024. Mr Pritchard pointed to the intervening Pandemic and also suggests there were delays in obtaining evidence from the Police, presumably about Pupil D since his statement was not taken until November 2023, which as I understand it also explains the 'amendment' the TRA made. Whilst I have some sympathy with the TRA from 2020 to 2021 with the Pandemic, this was a case with three young witnesses and was hanging over the Appellant for over five years. The TRA's delay is in my judgement not fully explained from 2022 onwards and I bear that in mind in the Appellant's favour. Mr Pritchard's better point was that the TRA's delay did not itself render the PCP's decision 'wrong' or 'unjust' due to 'serious procedural irregularity'. I bear in mind that even in *Dutta*, where allegations had not even been *initiated* by the GMC for over five years, there was no suggestion that it invalidated the final misconduct decision. Rather, the focus was the GMC's own (mis)application of the 5-year limitation period. Moreover, whilst Art.6(1) ECHR requires the determination of civil proceedings 'within a reasonable time', there is no suggestion that obligation was breached in this case, nor could there be any.

114. Instead, as I said earlier, the real issue with the delay is the effect on the cogency of the evidence given by the witnesses. The legal adviser advised the PCP that:

> "[T]he Panel is concerned with events which are said to have to taken place a long time ago. The Panel must appreciate that because of this, there may be a danger of real prejudice to the teacher. This possibility must be in the Panel's mind when it decides whether the Presenting Officer has proven whether the facts alleged are more likely than not to have happened. The Panel should make allowances for the fact that with the passage of time, memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events that occurred many years ago. Sometimes the passage of time may even play tricks on memories. The Panel should also make allowances for the fact that - from the teacher's point of view, the longer the time since an alleged incident, the more difficult it may be for him to

> answer it. The Panel only has to imagine what it would be like to have to answer questions about events that are said to have taken place seven to twenty years ago to appreciate the problems that this may cause by delay. Even if the Panel believes that the delay in the case is understandable, if the Panel decides that because of this that the teacher was placed under a real disadvantage in putting their case forward, take that into account in their favour when deciding if the Presenting Officer has proven whether the facts alleged are more likely than not to have happened"

There is no need to compare this with the Crown Court Compendium: it is a model direction on prejudice caused to a defendant by delay. Moreover, as Mr Faux accepts, the PCP *did* consider the impact of delay on the credibility of Pupils A and B (and does not complain how it did so). Moreover, the PCP specifically examined the delay in Pupil D's allegations and found it 'understandable'. The PCP also found his oral evidence 'compelling', 'credible' and 'reliable', not just on demeanour but 'with no significant changes and not discredited by cross-examination'. Given the PCP's advantage of seeing Pupil D's oral evidence, I cannot say that was 'wrong'.

115. Mr Faux's real complaint was the PCP's approach to the impact of delay on the *Appellant's* evidence, which needs to be considered for the different allegations:

(a) In relation to allegation 2 from 1990, the impact of delay on the Appellant's recollection was obviously very significant, although he was still able to give evidence about his conversation with the Headteacher and the change in the School's practice of supervising children. Whilst the impact of delay was mitigated to an extent by the contemporary notes, as the PCP found, some of the content was illegible and there were no minutes or letters from the time that could have enabled the PCP to make findings about what occurred. But as a result, consistently with the burden and standard of proof (and indeed the legal adviser's direction on delay), the PCP dismissed allegation 2. Therefore, the long delay (let alone the TRA's much shorter delay) did not ultimately cause the Appellant any prejudice on this issue.

(b) However, in relation to allegations 1di, ii and iii in 2004 by Pupil D, the delay of almost 20 years is bound to have caused the Appellant real disadvantage. Indeed, he said he not only had no memory of any incident with Pupil D involving him wetting the bed or showering, he had no memory of Pupil D at all. But even that real disadvantage to the Appellant does not mean the PCP accepting Pupil D's evidence was 'unfair' or 'wrong'. As the legal adviser correctly said, real disadvantage from delay was 'something to be taken into account in his favour': it did not itself render it unfair to uphold the allegations. As is well known, the Criminal Courts now often deal with allegations of 'historic sex abuse', often from decades, let alone years, earlier, that obviously causes real disadvantage to a defendant's recollection. That does not mean such charges cannot be fairly prosecuted. Likewise here: even though the Appellant was plainly caused 'real disadvantage' by the delay of twenty years or so (the last couple of years being the TRA's

responsibility), that was just something to be borne in mind in the Appellant's favour, but the weight of that factor was a matter for the PCP. Whilst the PCP did not specifically mention this factor, as Knowles J said in *Khan* at [92] in relation to a good character direction, what matters on appeal is whether it is possible to infer the PCP took delay into account in that way. They plainly did take the impact of delay into account in the Appellant's favour on allegation 2 and there is no indication they did not do so on allegations 1di-iii, even if they nevertheless found them proved. For example, there was no indication that the PCP held the Appellant's lack of recollection against him as such: true to the burden and standard of proof. Given that the Appellant did not need to prove anything (and the PCP did not say he did) and the PCP examined and found understandable Pupil D's delay in reporting, the real disadvantage to the Appellant was not *unfair* and the PCP's upholding of allegations 1di-iii was not 'wrong' or 'unjust'.

(c) In relation to allegations 1a and b by Pupil A and B, it seems unlikely there was any real disadvantage to the Appellant from the delay from 2015 to 2024. He had been made aware of those allegations in 2018 and had responded fully to them, both to the School in 2018 and the TRA in 2024. In the latter response, he did not suggest any disadvantage in his recollection from five years' delay and nor did his oral evidence suggest there was any.

Therefore, I dismiss Ground 1(n) as well and uphold all the PCP's findings of fact.

Grounds 1(l), 1(m)(iii) and 2: Inference of Sexual Motive and Prohibition Order

116. In this final (and comparatively brief) part of the appeal, I will proceed on the basis that (1) the PCP were entitled to admit and rely on the hearsay evidence as they did; and (2) the PCP were entitled to make the findings of fact that they did and to uphold allegations 1a, 1bi, bii, biii, di, dii and diii. The last issue is whether the PCP were also entitled to uphold allegation 3 that this behaviour was 'sexually-motivated' and/or 'conduct of a sexual nature'. This is challenged in Grounds 1(l) and 1(m)(iii), but is also linked to Ground 2, since although Mr Faux said that Ground 2 – the Respondent making the prohibition order itself – stood or fell with Ground 1, it is clear it was the finding of sexual conduct which caused prohibition. Without that finding, even if the PCP had found the Appellant had entered bathrooms whilst children were showering, or deliberately seen and/or touched them whilst naked, for some form of some non-sexual motive (e.g. excessive zeal in supervision), the prohibition order would not necessarily have followed. Therefore, under this heading, I will consider the following Grounds of Appeal:

1(l) *Having found proved the allegations of physical contact in the context of providing care for children who had wet their bed or who were required to remove excess sand from their bodies following a trip to a beach, the Panel inferred sexual motive with no proper consideration of possible alternatives*

1(m) *The PCP wholly failed to give adequate explanation as to…. iii) how sexual motive was inferred from the facts it found proved.*

2 *The Respondent was 'wrong to impose a prohibition because the Panel were wrong to find allegation [3] proved….as set out above.*

117. The legal adviser Mr Dave actually gave the PCP a detailed direction on this issue which Mr Faux did not criticise (nor could it be criticised as a matter of law):

> "[R]egarding the allegations of a sexual motivation, as with all findings of fact, the Panel is required to consider this question applying the balance of probabilities. The [High] Court … found it helpful in…*GMC v Haris* to refer to the definition of 'sexual' in s.78(1) Sexual Offences Act 2003:
>
> > *"Touching or any other activity is sexual if a reasonable person would consider that, a) [whatever] its circumstances or any person's purpose in relation to it it is because of its nature sexual or b) because of its nature, it may be sexual and because of its circumstances or the purpose of any person in relation to it or both, it is sexual."*
>
> …[T]he Panel may find it helpful to ask itself whether, on the balance of probabilities, reasonable persons would think that actions found proven could be sexual. If so, the Panel will need to go on to ask itself a second question: Whether in all the circumstances of the conduct in the case, it is more likely than not the teacher's purpose of such actions was sexual. The Panel must consider whether, in the absence of any direct evidence, sexual motivation should be inferred from the circumstances of the case. The court in *Basson v GMC* said that "*The state of a person's mind is not something that could be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence.*" This approach was endorsed [by the Court of Appeal] in *GMC v Haris*.
>
> The case of *Basson v GMC* also stated that sexual motive means the conduct was done either in the pursuit of sexual gratification or in the pursuit of future sexual relationship. In the [Court of Appeal in] *GMC v Haris,* in the context of allegations of an inappropriate examination, the court stated that this criteria set the bar too high. In…that case where the touching was not accidental, not consensual and without any clinical or proper justification, it was impossible to reach any other conclusion that the touching was sexual. The Panel should consider the circumstances of this case to determine whether it can be inferred that the teacher's purpose was sexual."

118. In *Haris v GMC* [2021] EWCA Civ 763, Andrews LJ (as she now is) at [31] and [32] summarised the relevant facts of *Basson v GMC* [2018] EWHC 5050 (Admin) and *GMC v Jagjivian* [2017] 1 WLR 4438, which are material to this discussion:

> "31. *Basson* was a case in which the finding was that the doctor had fleetingly touched the leg of a female patient when there was no clinical reason to do so and made a comment about her wearing a short skirt. The MPT found sexual motivation was proved, notwithstanding that (in contrast to the present case) it treated the doctor as a witness of honesty…. The doctor's appeal was dismissed: indeed Mostyn J went so far as to say it would have been arguably wrong for it to have reached another conclusion.
>
> 32. Similarly in *Jagjivan* the MPT had accepted a female patient's account of how a cardiology registrar had made inappropriate

> suggestions to her as to how her heart rate could be raised, by pointing to her nipples and vagina and suggesting that she could put pressure on them to get excited; despite this, they did not find proved the allegation that the doctor's actions were sexually motivated. The Divisional Court reversed that finding on the basis… *there could be no motivation other than a sexual one…."*

As noted above, the Divisional Court in *Jagjivian* also observed at [40]:

> "iv) [In] what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
>
> v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact…about whether conduct is serious misconduct or impairs a person's fitness to practise and what is necessary to maintain public confidence and proper standards in the profession and sanctions…see…*Khan v GPC* [2017] 1 WLR 169 [36]…
>
> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court 'is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal ….*Khan* [36(c)]"

119. In *Haris* itself, the GMC disciplinary Panel found that a GP had undertaken intimate examinations of two entirely separate female patients without informed consent (or gloves) with no clinical justification and no other plausible reason. However, the Panel accepted a psychiatrist's diagnosis that the GP had Asberger's Syndrome and no interest in sexual matters and concluded there was no sexual motive. Foster J in the High Court had allowed the GMC's appeal on the basis that finding was irrational and the Court of Appeal upheld that. Andrews LJ said at [37]:

> "In reaching its conclusions…. the Tribunal ignored the fact that the best evidence as to Dr Haris's motivation was his behaviour. As a matter of common sense, when a patient presents with pain in the upper back in consequence of a fall, there is no reason whatsoever for a doctor to examine her vagina, or to fondle her buttocks or breast. The behaviour was not just capable of being reasonably perceived to be overtly sexual, it *was* overtly sexual, and there is no other way in which it could have been perceived. A doctor, of all people, would have known that."

120. Returning to this case, as noted, the PCP's reasons on allegation 3 were very brief:

> *"3. Your behaviour as may be found at la and/or 1 b and/or 1 c and/or 1d above was sexually motivated and/or conduct of a sexual nature.*
>
> The panel has found the allegations 1a,1.b.i, 1.b.ii, 1.b.iii. and 1.d. proven. The panel has considered the facts of allegations 1a, 1.b.i, 1.b.ii, 1.b.iii, and 1.d. individually and has found that Mr Bruce's conduct was in pursuit of sexual gratification. The panel has found that on the balance of probabilities Mr Bruce's behaviour was sexually motivated and was conduct of a sexual nature. Therefore, the panel has found this allegation proved."

As Mr Faux said, when the PCP said it 'has found' sexual gratification, sexual motivation and conduct of a sexual nature, that was not referring back to earlier express findings, but rather were inferences it drew from its findings of fact. Mr Faux challenged the finding on allegation 3 in three ways I address in turn:

(1) Firstly, he submitted that the PCP should have included a *Lucas* direction to remind them that there may be innocent explanations for the Appellant not having admitted the allegations they had now found proven he had done;

(2) Secondly, he submitted in any event, the PCP had wrongly 'leaped' from upholding the allegations that they did to a finding of sexual motivation;

(3) Thirdly, he submitted that even if the PCP had not done that, they had failed to give adequate reasons for their finding of sexual motive on allegation 3.

121. I do not accept the legal adviser's (or the PCP's) omission to give a *Lucas* direction renders the decision on allegation 3 'wrong' or 'unjust'. The direction in *R v Lucas* [1981] QB 720 in the Crown Court is two-fold: (i) that a defendant who tells a lie is not necessarily guilty: sometimes they will lie for some innocent reason; and (ii) a lie is only capable of supporting other evidence of guilt if a Jury is sure (1) it was not for some innocent reason, (2) was deliberate and (3) it relates to a significant issue. However, as Lang J said in *Brittain* at [32]-[33] in the regulatory context, whilst (i) may be a useful self-direction, (ii) is unnecessary with a professional panel. Moreover, in *Fish* at [86], Foskett J questioned the utility of any '*Lucas* direction' where a doctor did not accept he had lied and the essential issue was simply to determine whether he was telling the truth. Foskett J said:

> "Plainly, the desirability for the [*Lucas*] advice to be given in any case needs to be considered in the context of the case being heard by the Panel, but where advice based on *Lucas* is given, it needs to be relevant to the issues in the case and fashioned accordingly."

Likewise here, the Appellant did not admit lying or suggest innocent explanations for conduct he denied. A *Lucas* direction was entirely unnecessary.

122. I also do not accept the PCP wrongly 'leaped' from upholding the factual allegations that it did to a finding of sexual motivation. Mr Pritchard pointed to the following passage in cross-examination of the Appellant by the Presenting Officer:

> *"HQ* [D]o you accept if these allegations are proven, a scenario where a teacher has seen pupils naked and touched Pupil D in a certain manner, do you accept that would be serious misconduct? *AB* I do." *HQ* And do you accept that as a teacher with your experience in 2004 and 2015/16, would know it would be inappropriate acting that way towards a pupil? *AB* Yes."

Therefore, not only was the Appellant not putting forward an innocent explanation for the conduct if found proved (such as a condition like Asbergers as in *Haris*), he was accepting that if it was found proved it would be inappropriate and misconduct. So, even if the conduct towards Pupils A and B was not so obviously 'sexual' as the conduct towards Pupil D (or the facts in *Haris* and *Jagjivian*), as in *Basson*, it was an inference well open to the PCP to draw and indeed flowed directly from the facts. Even now, the Appellant has not suggested any actual innocent explanation for the conduct found proved (as opposed to why he may deny it: the *Lucas* point). Indeed, even if (which I do not accept) the PCP was wrong to find the conduct proven was

sexually motivated or for sexual gratification, it was plainly right to find that Pupil D's allegations at least were 'conduct of a sexual nature' in the first category in s.78(1)(a) Sexual Offences Act 2003: '*a reasonable person would consider that whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual'*. Moreover, from that the PCP were plainly entitled to infer that even if Pupil A and B's upheld allegations did not fall into that first category, they fell into the second: '*because of its nature, it may be sexual and because of its circumstances or [its] purpose….or both, it is sexual'*. In other words, even if the conduct found in 2015 and 2016 was not itself 'of a sexual nature', given the findings of unambiguously sexual conduct in 2004, the PCP was entitled to conclude the 2015-16 conduct was sexually-motivated. I dismiss Ground 1(l).

123. On Ground 1(m)(iii), whilst the PCP's statement was in effect a conclusion rather than reasons, as discussed in relation to fact-finding in *Phipps* and *Southall*, there is no need for reasons where they are 'otherwise plain or obvious' as these were, as in *Basson, Jagjivian* and *Haris*. Even if that is wrong, as stated in *Byrne*, an appeal on reasons grounds will not be allowed unless the appeal court cannot understand why the decision was reached on the basis of all the underlying material. That clearly includes other parts of the PCP's reasoning, e.g. on misconduct in saying that:

> "The panel found that the offence of sexual activity and voyeurism were relevant."

Likewise, as the PCP went on to say in its recommendation to the Respondent:

> "In the light of the panel's findings against Mr Bruce, which involved entering a bathroom to see Pupil A showering in 2015. In 2016, telling Pupil A to remove his towel, to turn around whilst he was naked, and moving Pupil A's towel to expose his naked lower body. In 2004, using his hands to apply soap to Pupil D's body and genitals, and pulling the shower curtain whilst Pupil D was showering. The panel found that Mr Bruce did these actions for sexual gratification, that his behaviour was sexually motivated and conduct of a sexual nature…."

The PCP's reasons on this issue were sufficient. I dismiss Ground 1(m)(iii).

124. That only now leaves the relevant aspect of Ground 2: '*The Respondent was 'wrong to impose a prohibition because the Panel were wrong to find allegation [3] proved….as set out above'*. Of course, I have taken time to find the PCP were not 'wrong' to find any of the allegations proved that they did and so Ground 2 falls away. However, if I am wrong in relation to allegation 3, then as discussed in *Jagjivian*, an appellate court, especially on a rehearing, is less at a disadvantage in drawing inferences than overturning findings of primary fact - and indeed empowered to do so by CPR 52.11(4). For the reasons I have already given, on the basis of the findings of fact made by the PCP in this case, upholding allegations 1a, 1bi, ii and iii and 1di, ii and iii, I would unhesitatingly infer that on the balance of probabilities that conduct was all of a sexual nature and that even if the PCP were 'wrong' to uphold allegation 3 for the reasons they gave, I would dismiss the appeal on it. Moreover, whilst the reasoning of the Respondent for making a Prohibition Order is not separately challenged, I would conclude that a Prohibition Order without possibility of review was not 'wrong' or 'unjust' (especially given that the Appellant had effectively retired in any event) for the Respondent's reasons:

> "In this case, I have placed considerable weight on the panel's comments "Whilst there is evidence that Mr Bruce had ability as an educator, the panel considered that the adverse public interest considerations above outweigh any interest in retaining Mr Bruce in the profession, since his behaviour fundamentally breached the standard of conduct expected of a teacher, and he sought to exploit his position of trust." I have also placed considerable weight on the finding "The panel found that Mr Bruce did these actions for sexual gratification and that his behaviour was sexually motivated and conduct of a sexual nature. The panel believes that this is a case of serious sexual misconduct and sexual misconduct involving a child. I have given less weight in my consideration of sanction to the contribution that Mr Bruce has made to the profession. In my view, it is necessary to impose a prohibition order in order to maintain public confidence in the profession…. I have considered the panel's comments "…[N]o significant mitigation was provided for the panel to consider. The lack of insight and genuine remorse shown by Mr Bruce meant that the panel could not be satisfied that there would not be repeated behaviours and/or conduct that could put pupils at risk of harm again." In this case… allowing a review period is not sufficient to achieve the aim of maintaining public confidence in the profession….I consider therefore that allowing for no review period is necessary to maintain public confidence and is proportionate and in the public interest."

Result

125. I therefore dismiss all the Grounds of Appeal and consequently the appeal itself. Since the Appellant enjoys costs protection, I suggested in my draft judgment that I did not anticipate a further hearing would be necessary and Counsel helpfully agreed a draft order dismissing the appeal with no order for costs. However, I should acknowledge in conclusion that I am well-aware that the Appellant, his family, friends and many colleagues vehemently disagree with the PCP's conclusion and his Prohibition Order. Out of respect for that view, I undertook a rehearing in considerable detail but found the PCP's decision was not 'wrong' or 'unjust'. The seriousness of what the Appellant did to Pupils A, B and D means that he cannot teach again. However, it does not entirely obscure all the good that he did during his long teaching career.