Neutral Citation No: [2026] NIKB 35 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **OHA13072** *ICOS No:* **24/110081** *Delivered:* **12/06/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLES 29 AND 38 OF THE NURSING AND MIDWIFERY ORDER 2001

Between:

MILDRED JEAN WYLIE

Appellant

and

NURSING AND MIDWIFERY COUNCIL

Respondent

Mr M Chambers KC with Ms A Smyth (instructed by Arthur Cox Solicitors) for the Appellant
Mr J O'Keeffe KC with Mr M Hayward (instructed by Shean Dickson Merrick Solicitors) for the Respondent

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<u>O'HARA J</u>

Introduction

[1] This is an appeal by Mrs Wylie ("the appellant") against a series of findings made against her on 21 November 2024 by a Fitness to Practice Committee ("the Committee") of the Nursing and Midwifery Council ("NMC"). The time period covered by the charges ranges from 2002 to 2012. Of the 15 charges which the appellant faced, she was found guilty of 14. The Committee decided that the appropriate sanction was to remove the appellant from the nursing register.

[2] The charges related to alleged financial abuse of residents at two care homes which the appellant owned and operated with her husband for people with severe mental disorder and learning disabilities. The regulatory framework under which the homes operated is found in the Residential Care Homes Regulations (NI) 2005. Both the registered manager and the registered provider are considered to be a

"registered person" under the regulations. The appellant was registered with the Regulation and Quality Improvement Authority (RQIA) as the registered manager of both homes. Mr Wylie was registered as the registered provider. The RQIA is the independent health and social care regulatory body for Northern Ireland and is responsible for ensuring that health and social care services comply with the relevant regulations.

[3] During their ownership of the homes, Mr Wylie dealt with matters relating to finance, maintenance issues and HR. The appellant dealt with the care aspects of running the homes to include supervision and training of care staff and ensuring their mandatory training was kept up to date. Both homes were subject to periodic inspections by the RQIA and its predecessor. Annual care inspections took place and these were attended to by the appellant. Periodic finance inspections took place and were attended to by Mr Wylie.

[4] The NMC is responsible for the fitness to practise of individual nurses. The main objective of the NMC in exercising all of its functions is to safeguard the health and well-being of persons using or needing the services of members of the profession of nursing or midwifery who have been admitted to the register. While both Mr and Mrs Wylie were subject to the RQIA in their operation of the homes, only Mrs Wylie was subject to the oversight of the NMC because she was a registered nurse and had been since 1975.

[5] There is a long and unhappy history to this case as is evident from the fact that even the most recent of the charges dates back to 2012. Without going into the details of that history, at least at this stage, the Committee whose findings were challenged first sat on 26 July 2021, its disrupted hearings continued over 55 broken days and concluded on 26 August 2024 with its decision issuing just under three months later.

[6] While the appellant seeks to have the findings of the Committee quashed, she accepts that if they stand, she has no appeal against the sanction which was imposed on her. Accordingly, the issues pursued in the appeal focused primarily on the fairness of the hearing process, the legal advice which was given to the Committee and the legal tests which were applied.

The charges

[7] The charges faced by the appellant are set out below in summary form.

Charges 1 and 2: "Daycare meals"

Charge 1

On various dates between January 2005 and December 2011 she failed to meet the costs of meals at day care centres for one or more residents.

Charge 2

Her actions in charge 1 were dishonest in that she sought to obtain financial advantage by allowing residents to pay for their own meals at the day care centres.

Charges 3-5: "Additional payments"

Charge 3

On various dates between 2005 and 2012, she inappropriately charged Resident T additional payments for accommodation and care without clinical justification on one or more of the specified dates.

Charge 4

As above, with dates modified, in relation to Resident U.

Charge 5

As above, with dates modified, in relation to Resident V.

Charges 6-12: "Transport and supervision"

Charge 6

On one or more occasions, as set out in Schedule E, she overcharged residents for transport costs in that she:

(a) Did not divide the cost of group transportation amongst residents.

(b) Charged for a greater number of miles than the distance of the journey.

Charge 7

Her actions in 6(a) and/or 6(b) above were dishonest in that she knowingly overcharged residents for mileage to obtain financial advantage.

Charge 11

On one or more occasions, as set out in Schedule F, she overcharged residents for supervision costs.

Charge 12

Her actions, as set out in charge 11 were dishonest in that she knowingly overcharged residents to obtain financial advantage.

Charge 8

On 21 January 2011, she charged Resident X £117.60 for transport and supervision which Resident X did not receive.

Charge 9

Her actions in charge 8 were dishonest in that she charged Resident X for transport and supervision which she knew she did not receive.

Charge 10

On unknown dates, she obtained payments from Resident B for supervision when Resident B had not been assessed as requiring it.

Charges 13-14: "Miscellaneous"

Charge 13

Between 2009 and August 2012, she allowed the co-owner of Hebron House, Mr Wylie, to remain the appointee for Resident W when she had been told that it was inappropriate due to a conflict of interest.

Charge 14

On various dates between 2008 and 2013, she inappropriately charged one or more residents for holiday costs as set out in the schedule.

Charge 15: "Regulatory"

Charge 15

Between February 2009 and December 2011, she failed to co-operate with the RQIA finance inspections at the two homes, in that she:

(a) Did not provide the required documentation;

(b) Misled the inspectors by saying that no additional payments were being received;

(c) Failed to provide signed agreements for Resident T or Resident U when asked.

(d) Refused to allow the inspectors sight of the business bank account statements for one of the homes.

(e) Failed to provide an explanation for supervision charges despite being asked on four occasions between December 2011 and August 2012.

(f) Misled the inspectors by informing them that holidays took place mainly in Northern Ireland and Ireland and that there was no further documentation in relation to holidays than was provided.

This appeal

[8] Article 38 of the Nursing and Midwifery Order 2001 provides that in Northern Ireland an appeal from any order or decision of the Fitness to Practice Committee lies to the High Court. The powers available to the court on the hearing of the appeal are set out in article 38(3) and include the power to dismiss the appeal, allow the appeal and quash the decision appealed against, substitute for the decision appealed against any other decision which the Committee could have made or remit the case to the Committee to be disposed of in accordance with the directions of the court.

[9] There has been recent consideration as to how an appeal such as this to the High Court should proceed. The question which has arisen is whether it should proceed in the form of a full hearing with oral evidence being called or whether it should proceed as an appeal by way of review. In *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Samuel Thomas Haward* [2024] NIKB 33, Simpson J reviewed Northern Irish authorities and concluded that it is appropriate for the court to deal with the matter on the papers presented to it supplemented by oral submission rather than to require a complete rehearing. As I have in this case, he had available to him in that case a transcript of the disciplinary hearing, the written decision of the panel and various exhibits including guidance documents and relevant correspondence.

[10] In light of those authorities and with the agreement of both parties, I have considered this appeal by reference to the papers before me and the helpful and comprehensive submissions, oral and written, of counsel.

[11] The test which is to be applied is not defined by the Rules of the Court of Judicature. In England & Wales, however, the test is set out in the Civil Procedure Rules at rule 52.21 as to whether the decision of the Committee was "wrong" or "unjust because of a serious procedural or other irregularity." In this context, the authority of *Moseka v Nursing and Midwifery Council* [2014] EWHC 846, gives some helpful guidance. In that judgment, it is indicated that the appeal court may draw

any inference of fact which it considers justified on the evidence. At para [22], some other principles are highlighted which include the following:

> "(i) The appellate body has full jurisdiction on the appeal but this does not mean that it will, necessarily, not pay some deference to the fact finding function of the lower court or body;
>
> (ii) It will be unusual for the appellate body to hear oral evidence;
>
> (iii) In assessing the findings of fact of the lower court, the appellate court will have regard to the fact that the lower body is a specialist tribunal whose membership is selected for its experience in the subject matter;
>
> (iv) The appellate tribunal will recognise that the lower court has had the benefit of hearing and seeing the witnesses and is therefore in a better position to judge their credibility and reliability than is the appellate court.
>
> (v) The same degree of judicial deference will not arise where the decision of the court below is not based upon an assessment of the credibility or reliability of witnesses.
>
> (vi) Accordingly, to succeed upon an appeal, the appellant will normally be required to demonstrate a procedural error which occurred before the NMC or some error in its decision."

Grounds of appeal

[12] The Committee which heard the case against the appellant between 2021 and 2024 had an unenviable task. It inherited a case which had been started before differently constituted panels and then abandoned or aborted for different reasons over the previous years. During those earlier stages, the appellant had been legally represented by solicitors and counsel. By the time the 2021 hearing started, the appellant was no longer legally represented and was instead represented for the course of the proceedings by her husband, Mr Norman Wylie.

[13] As with all hearings of the Fitness to Practice Committee, none of the panel members was legally qualified. The NMC case was presented by counsel who is referred to as the Case Presenter in the proceedings. As none of the panel was

legally qualified, at hearings such as these it has the assistance of a Legal Assessor whose role is to advise the panel on questions of law arising in connection with any matter which the panel is considering.

[14] The Committee issued its decision just under three months after the hearing finished on 22 August 2024, quite a feat given that its decision extends to more than 250 pages. Court procedures required the grounds of appeal to be lodged within 28 days. At that point the appellant instructed lawyers who had previously represented her. Within those 28 days they had to read the judgment, advise and draft a notice of appeal without the benefit of having available to them at that point the transcript of the hearing. This background is relevant because at the start of the appeal before me, there was an application to amend the first and third grounds of appeal. I allowed the amendments after hearing from counsel. The grounds, as amended, can be summarised as follows:

(1) The impugned decisions on the charges were wrong as they were not made in accordance with law and are against the weight of the evidence and unjust because the decisions were reached following a number of individually and/or cumulatively serious procedural or other irregularities.

(2) The Committee conducted the hearing in a manner which was unjust because of a serious procedural or other irregularity by failing to order disclosure of material to the appellant and her representative which was relevant and would have assisted the appellant in advancing her case and undermining the case made by the NMC.

(3) The Committee took into account prejudicial matters which were not admissible rendering the proceedings unjust because of a serious procedural or other irregularity by receiving evidence that the appellant and her husband had been investigated by the PSNI for fraud and theft and that the PSNI had provided a file to the PPS in which they had recommended that the appellant and her husband be prosecuted for criminal offences and the PPS had declined to prosecute and further by receiving evidence of the actual conclusions of the Trust and RQIA investigations into financial abuse.

(4) This ground was abandoned.

(5) The Committee conducted the hearing in a manner which was unjust because of a serious procedural or other irregularity by unfairly and improperly restricting the appellant's representatives use of documents in cross-examination of the witnesses.

(6)&(7) Misdirection on dishonesty

The Committee was wrong to make findings that the appellant had acted dishonestly and in doing so, took advice into account which they should not have and ignored the evidence they should have taken into account. The hearing was unjust because of a serious procedural or other irregularity because the Committee misdirected itself in law relating to dishonesty and the factors it could take into account when seeking to determine if the appellant behaved in a manner which was dishonest.

[15] As will appear below, these grounds to some extent overlap with each other with some aspects of different grounds being relevant to others. I will deal with the different grounds in the order in which they were presented by Mr Chambers, Mr O'Keeffe having helpfully responded in the same order.

Ground 2 – Disclosure

[16] Disclosure of documents was pressed by Mr Wylie in this case on the basis that it was contended that the financial practices followed by the appellant in their two care homes were similar to those followed in other homes run by others. It was suggested that this was relevant to the Committee's consideration of the charges against her. At the very least, if she was doing the same as was being done elsewhere, the dishonesty charges might be more difficult to establish.

[17] There is a history to the disclosure issues in that in 2018, the predecessor Committee had considered the same point when the appellant was legally represented. That Committee had been persuaded by the NMC that it did not have power to order disclosure. Only when challenged in the High Court on that decision did the NMC concede that the Committee did, in fact, have such a power.

[18] When the case returned to that Committee, the NMC contended that the Committee had power to order disclosure under article 6 ECHR as part of the appellant's right to a fair trial but not under the powers given to it under the Fitness to Practise rules. After further argument that Committee ruled against the NMC and determined that its power to order disclosure came from both the rules and article 6.

[19] It is not necessary to explore all of the disclosure issues which were raised before the Committee in July 2021, but it is relevant to highlight the fact that the Southern Health and Social Care Trust ("the Trust") and the RQIA had provided the NMC with a lot of assistance and documents when the case against the appellant was being investigated. When the appellant sought to obtain documents from these and other sources, she received nothing. It is also relevant to note in this context that the appellant had tried to obtain documents from the PSNI because it had investigated the case against her in a criminal context and had recommended a prosecution but the Public Prosecution Service had directed no prosecution.

[20] By way of example, Mr Wylie asked among other things for disclosure by the Southern Trust (and other Trusts) of transport policies because, he suggested, these were or might be relevant to the practices which were being followed in the two care homes run by the appellant and Mr Wylie at the relevant times. If what they were

doing was in line with others, it might be considered to be a defensible policy. At the very least, it would be more difficult for a disciplinary Committee to find that it was a dishonest policy.

[21] The initial response of the NMC was that the appellant was duty bound to seek these documents herself. When it was established that she had, in fact, done so the next response was to challenge each and every one of the 16 requests for disclosure. The case presenter submitted that:

(i) None of the documents sought was relevant; and

(ii) The fact of the documents not being obtained or produced by the NMC did not trigger the article 6 fair hearing rights.

[22] This position was endorsed by the legal assessor who added a truly remarkable submission about what is meant by the concept of "equality of arms." He said that:

> "You must be satisfied, firstly, that an inequality of arms exists; that is say – it's colloquially referred to as an inequality of arms even by judges – but what it means is that there is a disadvantage in the facilities available to the defence which so utterly corrects their ability to present their defence that there is a collapse of justice, so some form of modification has to be allowed to repair that."

He continued:

> "… in these circumstances, the panel is entitled to ask whether there is an inequality, an imbalance of the kind of a catastrophic character that is aimed at. An imbalance in resources in preparing between the NMC and Mrs Wylie is so disproportionately great that it impacts on her right to a fair hearing. If the panel are not persuaded that this is so because there are other means available to Mrs Wylie to make her case, instead of – I've called it disclosure – but it means, of course, a requirement to produce, then the right to requirement to produce under article 6 may not be made out."

[23] At the stage when these arguments were being made to the Committee it had very limited knowledge of the case, no evidence having yet been called. While it had left open to itself the option of reconsidering its decision to refuse disclosure at a later stage as the hearing progressed, it did not, in fact, do so.

[24] In its decision at page 17-18, the Committee stated:

> "The panel heard and accepted the advice of the legal assessor … In reaching its decision, the panel carefully considered the submissions of Mr Wylie and [the case presenter] on all the relevant documentation. It also took account of the advice from the legal assessor who advised the panel that it must ask itself three questions:
>
> (i) Are the documents requested in disclosure relevant?
>
> (ii) Does the document exist now?
>
> (iii) Is there a reasonable prospect that the required target material can be obtained in a reasonable time so that the protection of the public and the objectives are maintained?
>
> The legal assessor reminded the panel that it has no power to compel compliance with the requirement to produce documents. The panel must be satisfied that the documents sought are relevant to the defence and that they could not be obtained in any other way by you."

[25] In my judgment, this decision on disclosure was fundamentally flawed because it was based on erroneous legal advice from the case presenter and from the legal assessor. Among the many reasons why that advice was wrong are the following:

(a) The primary test is, of course, relevance but the test is whether the documents may be relevant to the case being advanced by the NMC or to the defence being advanced by the appellant. To take just one example, the appellant may have been wrong in respect of transport or other charges but if what she was doing was also being done by others, that could be relevant to the specific allegations of dishonesty. It would not necessarily determine dishonesty but it could be relevant.

(b) The introduction of a test for obtaining documents in a reasonable time is unfounded. Any Committee (or court) would, of course, be concerned about the extent of delay which might be caused by an order being made, but there are ways of dealing with this rather than taking it as an essential element of the test for disclosure.

(c) The legal assessor's analysis of the concept of equality of arms is simply wrong. It is, of course, necessary to consider the extent of any alleged inequality but there is simply no authority to support the proposition that the only inequality which has to remedied is one of a catastrophic character.

(d) The Committee was also misled by the suggestion that as an alternative to disclosure, the appellant could call witnesses from other care homes and ask them what their policies were in relation to transport or supervision charges at the relevant time. Ignoring for the moment the prospect of her being able to do that approximately 10 years after the relevant time period, that is not an answer to the question of whether the documents are relevant. In fact, it suggests that the documents were indeed relevant.

(e) The Committee was further misled by being invited to consider whether any order made for disclosure, eg against the Southern Trust, RQIA or PSNI would be resisted or ignored or "might meet the same fate as earlier demands [by the appellant] for production of the material." There is no basis for such a submission especially in a case where the Trust and RQIA had already co-operated extensively with NMC. On what possible basis would they then refuse to assist further in the same case?

[26] In short, the Committee was taken down the wrong path entirely by both the case presenter and the legal assessor. It got the test for disclosure wrong in multiple respects. Not only does this represent a serious irregularity in the present case, but it is a real cause for concern if this attitude is one which is representative of the approach of the NMC generally.

[27] As the evidence before the Committee developed, the relevance of some of the documents for which disclosure had been refused emerged. Examples of this include:

(i) There was an issue about whether a particular resident, U, had behavioural issues which reached the level of being "challenging behaviour." A witness from the Trust who gave evidence, a Mr Andrew Hayward, was specifically asked about U's challenging behaviour. In explaining why a home might be justified in charging a top-up fee, he said that if there had been challenging behaviour it probably would be the case that that would fall within the remit of a specialist contract. But, according to Mr Hayward, the extent of the top-up fee charged by the appellant was very different from that charged by others. On the basis of Mr Hayward's evidence, it is extremely difficult to understand how documents about the extent of U's challenging behaviour were not relevant.

(ii) Disclosure was refused on the question of transport policies of other homes. Yet when Mr Hayward gave his evidence, in relation to transport costs, he says that:

> "If inherently, as I believe is the case, the policy is already over-costed and overpriced, if you compared it to any other reasonable policy that existed in other homes, then it would mean undoubtedly that you will reach that threshold of mobility allowance that you have put into the account across the years."

In other words, Mr Hayward was referring to other policies existing in other homes, an issue which the NMC had successfully argued was not relevant.

(iii) Furthermore, when Mr McRandle of RQIA gave his evidence, he said that the charges in the appellant's homes were excessive "in relation to what other homes were charging. Some – the majority of homes actually – were not charging supervision."

Mr McRandle was then asked by a member of the panel about other homes and specifically whether other homes differed in terms of supervision. He was referred back to his earlier answer and was asked what was the normal policy in relation to supervision charges. He answered:

> "The majority actually didn't charge."

The reference to practices in other homes, which was deemed earlier to be irrelevant, could not have been clearer.

Ground 3 – Prejudicial material

[28] At para [43] of its decision headed "Background", the Committee began to set out the background to the charges which it then had to reach its findings on. It stated that the allegations can be characterised as a number of instances of financial abuse in respect of the residents of the two care homes. It then continued as follows:

> "The Trust began an Adult Safeguarding Investigation in relation to six residents resulting in a report dated 31 October 2012. That investigation gave rise to further concerns, leading to a second investigation being conducted into 35 past and current residents. The second investigation led to a further report dated 9 August 2013.
>
> The two Trust reports led to further investigations by the RQIA resulting in a finance report dated 30 January 2014. The report's conclusions led to criminal prosecutions being instituted by the RQIA in relation to both Mr and Mrs Wylie. These were stayed by the magistrates' court in December 2015.

> The Police Service of Northern Ireland ("the PSNI") were informed of the concerns and conducted an investigation into suspicions of fraud and theft. The PSNI passed a file to the Public Prosecution Service ("the PPS") with a recommendation to prosecute, but in February 2015 the PPS directed no prosecution.
>
> The NMC investigation was resumed when the criminal matters came to an end."

[29] On behalf of the appellant, it is contended that this information which the Committee took from the opening of the case presenter should never have been put before it. For the appellant, it is submitted that if she had been legally represented at that hearing there would inevitably have been an application to the Committee to discharge itself because this "background should never have been put before it," especially since what is referenced is, in effect, almost exactly the case which the Committee itself was then being asked to consider.

[30] For the NMC, Mr O'Keeffe submitted that even before the case had been opened to the Committee, Mr Wylie had himself referred, during his disclosure application, to the Trust investigation and report and to the RQIA investigation. Moreover, it was the appellant who sought and was granted permission to admit the safeguarding report in evidence. This was allowed by the Committee save that, in line with the submission by the case presenter, the conclusions reached by the Trust were not to be admitted as part of that evidence because it was for the Committee itself to reach its own independent conclusions.

[31] Mr O'Keeffe correctly pointed out that these references are to be found only in the introductory background section of the Committee's findings. They are not to be found in the extensive analysis and discussion of the case against the appellant nor in the conclusions which were reached.

[32] Mr Chambers submitted in response that Mr Wylie's error in introducing or referring to the documents in the course of disclosure was understandable given that he is not a lawyer, but that does not excuse the fact that they were referred to in the case presenter's written opening prepared before the disclosure application was advanced to the Committee.

[33] With even more force, Mr Chambers submitted that matters were made worse by the fact that the Committee then received prejudicial evidence by way of a written statement from Ms Trainor which was produced and relied on by the NMC. Ms Trainor, who also gave oral evidence, said in that written statement that in her role as Head of Service for Adult Safeguarding in the Trust she had attended a meeting with the Trust and RQIA to discuss the findings of their investigations and to conclude whether, in their view, allegations of financial abuse in the homes had been substantiated. Her written statement to the Committee informed them that the

case conference "was unanimous in agreeing that financial abuse had occurred" in relation to daycare meals, additional payments and transport, precisely the same areas that the charges before the Committee covered. Moreover, when Ms Trainor gave evidence she was questioned by the Chair of the Committee who directly referred to the unanimous conclusion of the Trust and the RQIA that there had been financial abuse.

[34] It is more than difficult to accept the submission for the respondent that the referrals to the prejudicial material do not amount to a serious irregularity. The Committee was entitled to be given some understanding of the background to the case, especially since it was considering in 2021 allegations which arose from events a decade or more earlier. However, these could easily have been covered by a general reference to the fact that there had been an extensive history to the case but the reasons for that did not need to be and should not be particularised. That would have avoided any references to proceedings being stayed in the magistrates' court or to the PSNI recommending a prosecution but the PPS directing that there should, in fact, be no prosecution.

[35] Ms Trainor's statement of evidence makes matters even worse. Her statement is dated 21 April 2016, some five years before this Committee sat. There is, in my judgment, no possible justification for her including in that statement the reference to the Trust and the RQIA being unanimous in agreeing that financial abuse had occurred.

[36] A further element relied on under this heading by the appellant is the fact that one of the Committee members had been on the Board of the RQIA for six years until 2020 and the panel chairman was a former senior police officer.

[37] Both parties referred me to the case of *Enemuwe v Nursing and Midwifery Council* [2015] EWHC 2081, in which Holman J quashed the decision of a Fitness to Practise Committee on the basis that he found there had been a serious irregularity in its proceedings. The particular serious irregularity in that case related to the apparent reliance of the Committee on the outcome of a separate investigation by a supervisor of midwives. In that case, like the present, the investigation by the supervisor of midwives and the task of the Committee were effectively identical namely, to decide whether the individual had said or done the very things alleged against her.

[38] Holman J acknowledged that the background to many, if not all, investigations are likely to include some complaint or allegation in some disciplinary or other investigation at the local level. But he continued:

> "[78] But there is a world of difference between their knowing that there has been some investigation and their actually paying regard to the factual outcome of the

> investigation in reaching their own findings and conclusions on disputed issues of fact.
>
> [79] At the risk of repetition, it is my view that the position was correctly summarised by Mr Rich in the passage I have already quoted, namely that normally the findings of fact made at some earlier investigation by another panel or another person are not admissible in proceedings before this Committee.
>
> …
>
> [82] Although the Committee clearly conducted this whole hearing with the utmost care and although they clearly demonstrated a capacity to discriminate between the various charges, some of which were found proved and others not proved, there must a risk here that in some way they allowed themselves to be influenced, even if only peripherally, by their knowledge that all the allegations had earlier been upheld by [the Supervisor of Midwives].
>
> [83] What they should, in fact, have done was to decline to admit any evidence by any means of the outcome of the supervisory investigation and they should have treated their findings on decision of the (SOM) as completely irrelevant and excluded from their consideration. "

[39] Even if I allow for the fact that Mr Wylie introduced some of this material himself on behalf of the appellant and referred to it in his disclosure application on entering the substantive hearings, it should have been entirely obvious to those presenting the case for the NMC to the Committee that Ms Trainor was entirely wrong in including in her statement evidence to the effect that the case conference "was unanimous in agreeing that financial abuse had occurred."

[40] I find that ground 3 is established and that this represents a serious irregularity in the proceedings before the Committee.

Ground 5 – Restricted use of documents in cross-examination

[41] As the appeal developed this issue was relegated in significance by the appellant. To the extent that it is relied on at all, it is now subsumed in ground 1 which will be dealt with below.

Ground 6 and 7 – Misdirection on dishonesty

[42] The appellant's case on appeal was that the Committee was wrong to make findings that she had acted dishonestly, and in doing so, it took evidence into account which it should not have and ignored evidence that it should have taken into account. In addition, it was submitted that the hearing was unjust because of a serious procedural or other irregularity because the Committee misdirected itself on the law relating to dishonesty and on the factors which it could consider when seeking to determine if the appellant had behaved in a manner which was dishonest.

[43] Four of the charges (2, 7, 9 and 12) against the appellant alleged dishonesty. She was found guilty on each one. In effect, the NMC case was that the overcharging alleged in counts 1, 6, 8 and 11 was not just unjustified – it was dishonest. This is of importance not just because of the imputation against the appellant which affects her reputation but also because NMC guidance makes it clear (and rightly so) that a nurse who acts dishonestly will be at greater risk of being removed from the register.

[44] In *Moseka v NMC* [2024] EWHC 846 at para [24], Greene J said this about the approach to offending of dishonesty of a Committee such as the present:

> "The severity of the potential consequences is a factor that a regulatory authority will need to bear in mind when applying the civil standard of proof. It is trite that the standard of proof can adjust to the context. In a regulatory case where dishonesty is the issue, even on the civil standard, the [Committee] should apply particular care. If dishonesty is found then likelihood of a severe sanction being imposed (including striking off) is quite high."

[45] Both the case presenter and the legal assessor addressed the Committee on the test for dishonesty, correctly referring to *Ivey v Genting Casinos* [2017] UKSC 67. The test is as follows:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by

> applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

[46] The difficulty in this case is that having correctly identified the proper legal test, the case presenter misrepresented the approach which the panel should take when applying that test. As Mr O'Keeffe conceded in the course of his submissions, the case presenter "regrettably" suggested that if the appellant ought to have known what charges were being made, that was enough. This is important because it was the appellant's case that her husband took responsibility for financial issues. That was not accepted by the NMC who submitted that she did know. In the alternative, however, it was submitted by the case presenter that if the appellant did not know because she was wilfully blind about financial issues, such wilfulness could amount to dishonesty. In making that submission, the case presenter led the Committee astray. He equated "must have known" with "ought to have known." His closing submission was explicit in that point at para [27] when he said:

> "It is submitted that Mrs Wylie must have known about the contractual provisions, or else ought to have known about them. It must be a basic obligation on a registered manager to familiarise herself with the contractual basis on which she operates."

[47] *Ivey* is quite clear on this. Negligence is not sufficient for a finding of dishonesty. The Supreme Court said at para [62]:

> "Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice."

[48] To be fair to the case presenter, he took the Committee to that passage, quite properly so. Unfortunately, he then said:

> "That's rather technical and not immediately relevant."

[49] With respect, it was unquestionably relevant.

[50] While Mr O'Keeffe accepted that it was regrettable that the case presenter made this error, he suggested that it was not one which had been repeated by the legal assessor. Accordingly, he said, the Committee was not misled. I reject that submission. The legal assessor did not correct the error. If he had done so, the

Committee's findings on dishonesty might have been salvageable, but since he did not, in my judgment, they are not.

[51] I heard rather more in the course of submissions about the proper interpretation of the Residential Care Homes Regulations (NI) 2005. For the appellant it was submitted that the Committee was misled about the extent of the appellant's duty to be aware of financial issues and that it was simply incredible for her to say that she did not know about them. Since she was incredible, the Committee was invited to infer that she was dishonest.

[52] In my judgment, that dispute is not central to the challenge to the Committee's findings. Let me be clear – it was the responsibility of both the NMC and the legal assessor to be precise and accurate in their submissions to the Committee, especially on legal issues. The Committee relied on their advice, particularly in this case where the appellant had no legal representative. And if one representative went wrong, as Mr O'Keeffe has conceded the case presenter did, the other source of advice and support, the legal assessor, had to correct him. He did not do so.

[53] This represents a significant irregularity. I cannot possibly assume that this Committee, no matter how diligently and faithfully they were applying themselves in what clearly became a fractious and disrupted hearing, was not misled. Its findings on dishonesty simply cannot stand.

Ground 1 – Cumulative effect of irregularities

[54] In light of the findings which I have already made, the Committee's decision that the charges against the appellant were proved must be quashed. It is simply not safe to let any of them stand when I have found that there were serious irregularities with the disclosure process, with the reference to prejudicial evidence about the conclusions reached after investigation by other bodies and with the advice which the Committee was given on the application of the test for dishonesty.

[55] That being so, I can deal in comparatively short form with other issues which are raised. I start by acknowledging again that this Committee was handed the most unenviable of tasks in 2021 when it was assigned responsibility for adjudicating on charges which covered a period a decade or more earlier. It was not helped by the fact that for a variety of reasons, some of which are attributable to the conduct and absences of the appellant and her husband, the hearing took place in 16 tranches over 55 days.

[56] I was informed that some of these delays came about because the legal assessor and at least some of the Committee who do not live in Northern Ireland were travelling back and forth with consequences for their easy availability. This is a problem which the NMC should really consider in future cases, especially those which have the potential to last for a number of weeks.

[57] The fractured and prolonged nature of the hearings, in an already old case, necessarily give rise to the question of whether the appellant was denied a fair hearing within a reasonable time as required by article 6 ECHR. In *Johnson and Maggs* [2013] EWHC 2140, the High Court was extremely critical of the NMC for inadequate procedures which had resulted in 10 years of what was described as inexcusable delay. The Committee in that case had identified the causes of the delay as being the complexity of the case, the conduct of the defence, the conduct of the NMC and what the Committee called "the practical reality of litigious life." The court said:

> "The NMC is not of course responsible for the conduct of the defence. However, the NMC is obviously responsible for its own conduct; and the complexity of the case and "the practical reality of litigious life" are matters which the NMC must shape its procedures to accommodate. When every allowance is made for the extent to which the conduct of the defence contributed to the delay, the length of time which these disciplinary proceedings took remains disgraceful."

[58] It is hard to see how the same finding is avoidable in the present case. This Committee was responsible for what happened between 2021 and 2024, but the delay predated its involvement by eight years. And as has already been illustrated, at least some of that delay was due to the stance which the NMC took on the issue of disclosure long before 2021.

[59] The appellant also relied on the fact that one of the members of the Committee had served on the Board of the RQIA from 2014 to 2020. Given that the RQIA had a deep involvement in the case before 2021, it is highly questionable whether justice could possible be seen to be done in circumstances where a major witness for the NMC was an RQIA finance inspector and there were more that 1,000 references to the RQIA during the hearing. The very fact of his RQIA service should have led to this member of the Committee at least considering whether he should recuse himself. This is a free-standing obligation on all office holders and one which does not depend on an application being made.

[60] The failings of the legal assessor have already been referred to above. Let me put it this way – the Committee was entitled to expect and should have received more reliable assistance from this lawyer. The same applied to the case presenter. In this context, yet another example of questionable legal intervention was the issue raised in ground 5 of the appeal, namely the erection of obstacles when Mr Wylie tried to cross-examine witnesses from documents, as he was entitled to do.

Conclusion

[61] The cumulative effect of these issues is that the decision of the Committee to find all but one of the charges proved against the appellant cannot possibly stand. I therefore allow the appeal and quash the findings. It follows from this that the sanction of removal from the register must also fall.