

COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE

NOTE OF MEMBER'S DECISION

Re: Dr Chaitanya Patel

THE MEMBERS WHO CONSIDERED THE CASE

Peter North (Chair)
Rosie Varley
Sue Leggate

Definitions

In this note, the following abbreviations will apply:

"CHRE"	Council for Healthcare Regulatory Excellence
"the members"	The CHRE members who considered this case
"the FPP"	Fitness to Practise Panel
"the GMC"	General Medical Council
"Dr Patel"	Dr Chaitanya Patel
"the Complainants"	Lynde House Relatives Group
"Lynde House Relatives Group"	LHRG
"the Mowat Report"	Report produced by Suzanne Mowat dated December 2000
"the McLaren Report"	Report produced by the McLaren consultancy, the final version before the FPP was dated May 2002
"the Act"	<i>NHS Reform and Healthcare Professions Act 2002</i>
"the <i>Roylance</i> case"	Judgment of the Privy Council in the matter of <i>Roylance v The General Medical Council</i> [2001] 1 A.C 311
"the <i>Truscott/Ruscillo</i> judgment"	Court of Appeal Judgment in <i>Dr Giuseppe Ruscillo v (1) The Council for the Regulation of Health Care Professionals (2) The General Medical Council and Council for the Regulation of Health Care Professionals v (1) The Nursing and Midwifery Council (2) Steven Truscott</i>

The FPP's decision

The members considered whether the decision of the FPP of the GMC on 30 June 2005 to find Dr Patel not guilty of serious professional misconduct ("SPM") should be referred to the High Court under Section 29 of the Act. Pursuant to the *Truscott/Ruscillo* judgment, CHRE has jurisdiction to consider this case under section 29(4)(b) of the Act.

The FPP's decision followed the amendments to the charges against Dr Patel described in paragraphs 7 to 12 and 21 and 22 below and Dr Patel's admission of charges:

1a, 1b, 2, the stems only of 10,11 and 12 and the whole of 15 and 16

The FPP recorded that it considered the Complainants' submission that no evidence would be offered on the heads of charge remaining and not admitted. In conclusion the Panel announced that:

"In view of the submissions made, and no evidence having been adduced, the Panel has concluded in accordance with Rule 27(1)(d) of its rules that it must record and announce a finding that Dr Patel is not guilty of serious professional misconduct in respect of the matters to which the remaining Heads of Charge relate".

Documents

The following documents were provided to the members:

1. Transcripts of the FPP hearing dated 31 January to 4 February 2005, 7 February 2005, 9 to 11 February 2005, 14 to 16 February 2005 and 30 June 2005 (13 days).
2. Determination of the FPP dated 30 June 2005.
3. Revised charges against Dr Patel dated 30 June 2005.
4. Note of the hearing on 18 February 2005 before Mr Justice Collins.
5. Note on the case of Dr Patel prepared by Field Fisher Waterhouse.
6. The Mowat report dated December 2000.
7. The McLaren Report dated May 2002.
8. Email to CHRE dated 14 July 2005 from the LHRG.
9. Letter dated 18 July 2005 from the LHRG to CHRE and enclosures.
10. Letter dated 20 July 2005 from the LHRG to CHRE with enclosures.
11. Report prepared by Baker & McKenzie dated 19 July 2005.

Conflicts of Interest

The members noted that they had no apparent conflicts of interest and no conflicts of interest were registered.

Matters considered by the meeting

The members considered the matters set out below.

Background to the case

1. Dr Patel had been a registered medical practitioner since 1979 and his evidence was that he ceased active clinical care in 1985. Dr Patel was Chief Executive Officer ("CEO") of Westminster Health Care ("WHC") from 29 April 1999 to 30 April 2002. Dr Patel's evidence was that after 30 April 2002 he ceased to have any involvement with WHC and Lynde House. This case involved charges in respect of alleged problems at Lynde House, a nursing home operated and owned by WHC at the time Dr Patel was CEO.
2. The members considered the full initial charges brought against Dr Patel. The members also considered the revised charges. It appears from the transcript that the revised charges were subject to the consent order in the judicial review proceedings.

The revised charges were formally adopted by the FPP in its determination of 30 June 2005.

3. This was a complainant prosecuted case rather than a case brought solely by the GMC. The Complainants (the LHRG) were relatives of residents at Lynde House. The members noted that one of the changes to the GMC's Fitness to Practise scheme is to now only allow cases to be prosecuted by the GMC. Therefore, CHRE's understanding is that there have been no new complainant prosecuted cases since 1 November 2004 although there are still some cases to be heard under the previous scheme.
4. The initial and revised charges deal with alleged problems at Lynde House. The alleged problems were primarily set out in two reports. The Mowat Report was the first report and it was produced in December 2000 by Suzanne Mowat. The Mowat Report was commissioned by WHC and Ms Mowat was an independent consultant. The second report, the McLaren Report, was produced by Mary McLaren of the McLaren Consultancy and the final version is dated May 2002. This report was commissioned by the Kingston and Richmond Health Authority. The charges against Dr Patel (heads 10 to 14) also referred to a number of letters either sent directly to Dr Patel or to Miss Sheila Roy (Group Director of WHC at the relevant time) copied to Dr Patel dealing with alleged issues at Lynde House.
5. The original charges against Dr Patel relied in large part on the contents of the Mowat and McLaren Reports. The hearing of the FPP commenced on 31 January 2005. At the commencement of the hearing counsel for Dr Patel raised objections to heads of charge 5-9 (dealing with the Mowat Report) and 15-20 (dealing with the McLaren Report) under Rule 24(2) of the GMC's 1988 Procedure Rules. This was on the basis that the Mowat and McLaren Reports were inadmissible before the FPP and the FPP could not rely upon the matters set out as facts and findings in the reports.
6. Dr Patel's counsel also objected to heads of charge 2-4 (alleging Dr Patel was responsible for care of the residents at Lynde House) primarily on the basis that as CEO of WHC there was no direct link between any conduct of Dr Patel and the alleged problems at Lynde House.

The decisions made by the FPP during the hearing

7. The members considered the three relevant decisions made by the FPP during the hearing. The FPP's decisions were made on 7 February, 14 February and 16 February 2005.
8. On 7 February 2005, the FPP gave its decision on the application by Dr Patel. In summary the FPP ruled:

Charge	Subject Matter	Removed or Retained
2 to 4	As CEO of WHC Dr Patel was responsible for providing and maintaining an environment at Lynde House whereby proper standards of care were provided to elderly residents. This included matters such as ensuring the clinical care afforded to residents was of a reasonable standard.	Retained

5 to 6	In December 2000 WHC commissioned the Mowat Report into Lynde House following the receipt of a number of complaints. As CEO of WHC Dr Patel knew or ought to have known that (a) by December 2000 complaints about Lynde House were sufficiently serious to require investigation by an independent enquiry; and (b) that the Mowat Report was received by WHC on or about January 2001.	Retained
7 to 8	The Mowat Report identified several areas of concern at Lynde House such as lack of clinical supervision of residents. Dr Patel knew or ought to have known of the facts and matters set out in head 7 which detailed the findings of the Mowat Report.	Removed. The FPP decided that the Mowat Report was inadmissible.
9	Given the findings of the Mowat Report Dr Patel failed in the respects set out at 9a to 9e. These included matters such as failing to safeguard the health, safety and welfare of elderly residents at Lynde House and failing to act in the best interests of those residents.	Retained without accepting the legal assessor's advice.
10 to 14	Detailing complaints set out in three specified letters two of which were sent to Dr Patel and the third one was sent to Mrs Sheila Roy, copied to Dr Patel. These letters dealt with alleged problems at Lynde House.	Retained (not subject to challenge by Dr Patel's counsel).
15 to 16	In or about December 2001, an independent investigation, commissioned by the Kingston and Richmond Health Authority, was undertaken by the McLaren consultancy. In May 2002 the McLaren Report was produced which set out the facts and matters specified in 16a to 16f. These were statements such as 16b, "that it was apparent that insufficient action had been taken in relation to [the complaints of relatives] and that it was perceived by many relatives that no one was listening, taking them seriously or resolving the concerns raised".	15 retained. 16a to 16f removed on the basis that the FPP decided the McLaren Report was inadmissible.
17 to 19	The McLaren Report recorded and found established certain facts and matters in relation to Lynde House as set out in 17a to 17n. The McLaren consultancy investigation revealed that on three occasions, 11 th August 2000, 21 st September 2001 and 8 th November 2001, inadequate numbers of staff were present. The McLaren consultancy investigation dealt specifically with complaints in relation to the patients set out at 19a(i) to 19a(xiii) and the McLaren Report upheld the complaints in relation to the residents set out in 19a.	Removed on the basis that the FPP decided the McLaren Report was inadmissible.

20	Given the findings of the McLaren investigation set out in heads 16, 17 and 18 Dr Patel failed in relation to the matters in 20a to 20e. These included matters such as 20a, failing to safeguard the health, safety and welfare of elderly residents residing at Lynde House.	Retained without accepting the legal assessor's advice.
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9. The FPP heard detailed submissions from Dr Patel's counsel as to why the Mowat and McLaren Reports were inadmissible. In summary, it was submitted that it is a principle of criminal law (the principles of which are generally applied by the FPP) that even if a decision of another tribunal is admitted before a Court, the decision cannot be taken as proving the facts underlying that decision. The Court, or in this case the FPP, must still consider and decide on the facts themselves. On 7 February the FPP ruled that the Mowat and McLaren Reports were inadmissible.
10. In relation to two of the heads of charge (9 and 20) the FPP reached its decision to retain these charges without accepting the legal assessor's advice. The legal assessor gave advice that the Mowat and McLaren Reports were inadmissible. Counsel for the Complainants submitted that even if the reports were inadmissible, it would be possible for the FPP to make findings on the heads of charge that draw conclusions from the reports. This would be on the basis that the FPP received further evidence of the underlying matters set out in the reports. The legal assessor advised that it would not be possible to take this approach because charges 9 and 20 set out the conclusions the FPP might reach from the matters dealt with in the reports.
11. After the FPP's 7 February decision counsel for the Complainants applied to amend the charges. This was opposed by counsel for Dr Patel. The FPP decided on 14 February 2005 that it would allow certain amendments.
12. Counsel for Dr Patel made a further application to strike out charges 9 and 20. On 16 February 2005 the FPP rejected the application on behalf of Dr Patel. Dr Patel's counsel immediately asked for a temporary stay of the FPP proceedings to allow for an application to be made to the High Court for judicial review of the decisions of the FPP.

The judicial review proceedings

13. The members noted that CHRE has not been told whether any of the documents it has received were also filed in the judicial review proceedings. CHRE has not been provided with the Claim Form, Grounds for judicial review, Grounds of opposition or any witness statements filed in the proceedings. The members noted the comments made by LHRG, in their email of 14 July 2005 and in the letter of 20 July 2005 that documents from the Complainants were not before Collins J.
14. CHRE has been provided with a note of the decision delivered by Collins J on 18 February 2005. The members took into account that this was a note prepared by someone from the GMC. CHRE understands that the person was present at the hearing and made the note as a record of the hearing. The members also considered the report given by Dr Patel's counsel of Collins J's decision and the extract from a press report sent to CHRE by the LHRG which they said represented some of Collins J's comments. The members noted that these various reports were

consistent and that there is nothing disclosed in the documents CHRE has seen to suggest that the note is inaccurate in any significant respects.

15. The members noted that the application heard by Collins J was initially for a stay of the FPP proceedings, however, at the judge's suggestion the parties agreed that Collins J might also grant permission to apply for judicial review. The members took into account that at the permission stage the Court is assessing whether there is an arguable case for judicial review of the decision.
16. The members noted that Collins J expressed in clear terms his views on the issues he considered relevant. Collins J decided that a stay of the FPP proceedings should be granted. Collins J also considered that there were clearly arguable grounds for judicial review and granted permission. Collins J expressed views on the merits of the case. The members took into account that a judge is entitled to make such comments when granting permission although the full merits would then have been considered at the substantive judicial review hearing. The members noted that the substantive hearing did not take place because the judicial review proceedings were resolved by consent.
17. The note records that Collins J said that this was a case in which things have gone badly wrong. Collins J added that normally the Court would be reluctant to interfere at an interlocutory stage, but in his view these charges were misconceived and flawed. Collins J considered that for Dr Patel to be found guilty of SPM the following matters would have to be established:
 - (a) There were problems in the care home, independent of the reports;
 - (b) Dr Patel was in some way involved in the management of the home and he knew or ought to have known what was going on;
 - (c) There was professional misconduct involving him personally.

Collins J asked what evidence there was that Dr Patel was personally involved in what may have gone wrong at Lynde House.

18. The note records that submissions were made to Collins J by counsel for the Complainants (Ms Elizabeth-Anne Gumbel QC who was also counsel before the FPP). The GMC were separately represented at the permission hearing and the GMC's counsel (Philip Havers QC) also made submissions in opposition to Dr Patel's application. Counsel for the Complainants referred Collins J to the case of *Roylance -v- GMC* [2000] 1 A.C 311. The *Roylance* case involved the CEO of the Bristol United Hospital who was found guilty of SPM by the GMC's Professional Conduct Committee (as the FPP was then named). The note records that Collins J considered the case against Dr Patel to be "pretty thin" if only *Roylance* was relied on. (The members also considered the *Roylance* case as set out in paragraphs 44 to 49 below.) The note records a comment from Collins J that, "on the face of it there is not a great deal of evidence to suggest that Dr Patel should be responsible [for what has gone on in the care homes] or that there has been professional misconduct".
19. It appeared that Collins J had considered the Mowat and McLaren Reports. The members took into account that Collins J was not deciding the full merits of the case, however, the note records that he commented that the reports were only an indication of things which had gone wrong in the past and that there was no suggestion that there have been any problems since.

20. Collins J was also concerned that in respect of charges 9 and 20 the FPP had acted contrary to the legal assessor's advice. Collins J recognised that it was advice that was being provided and not a direction so the FPP could depart from the advice, however, his view was that the remainder of the charges seemed irrational. Collins J's view was that the case needs to be fundamentally reconsidered and that this was an exceptional case where interlocutory relief would be merited.

The FPP's determination of 30 June 2005

21. The FPP's determination records that on 15 June 2005 with the consent of all the parties the Court's stay of the FPP proceedings was lifted and an order was made resolving the judicial review proceedings. CHRE has not been provided with a copy of the consent order in the judicial review proceedings. However, on page 1 of the 30 June transcript, counsel for the Complainants records that the consent order struck from the notice of enquiry heads of charge 3, 4, 9 and 20 (in addition to the charges the FPP had previously removed) and disallowed the FPP's amendments to heads of charge 6, 9, 14 and 20.
22. Counsel for the Complainants explained to the FPP that it was only heads of charge 10, 11, 12 and 14 that remained (relating to complaints set out in certain letters sent to Dr Patel and in a letter to Sheila Roy which Dr Patel received a copy of). It was explained to the FPP that even if the remaining heads were proved it had been considered whether these would be sufficient for a finding of SPM. It was further explained that the GMC's view, based on the advice that it had received, was that the limited evidence would be insufficient to support a finding of SPM. Counsel for the Complainants then said that "the complainants reluctantly accept that they are unable to proceed with the remaining heads of charge and consequently they will call no evidence".
23. The members considered the further submission made by counsel for the Complainants:

"However, the complainants, who are the Lynde House Relatives Group, wish to state and put on public record that the result of the judicial review proceedings (which succeeded in respect of some of the heads of charge on technical grounds) and the GMC's view in respect of heads of charge 10, 11, 12 and 14 (on the grounds that even if proved, these heads of charge would not amount to serious professional misconduct on the part of Dr Patel) is that they have not had the opportunity to give their evidence to the Panel. They regret that the evidence in their witness statements, to which they adhere, has neither been heard nor tested and they will not have a full investigation by the Panel into their complaint".

24. The FPP recorded the charges that had been struck from the notice of enquiry. It also recorded that through counsel Dr Patel admitted heads of charge 1a, 1b, 2, the stems only of 10, 11 and 12 and the whole of 15 and 16. The FPP stated that:

"In relation to the admitted facts the Panel has concluded that these would be insufficient to support a finding of serious professional misconduct".

25. The Panel recorded that it considered the Complainants' submission that no evidence would be offered on the heads of charge remaining and not admitted. In conclusion the Panel announced that:

"In view of the submissions made, and no evidence having been adduced, the Panel has concluded in accordance with Rule 27(1)(d) of its rules that it must record and announce a finding that Dr Patel is not guilty of serious professional misconduct in respect of the matters to which the remaining Heads of Charge relate".

The Mowat Report

26. The members noted that the Mowat Report does not specifically set out the terms of reference or why it was commissioned. However, it is stated in the transcripts that it was commissioned by WHC. It is stated in the introduction to the report that Ms Mowat visited Lynde House on three occasions during the last two weeks of December 2000 to review matters raised in complaints and to ensure that the skills and models of care provided were based on sound good practice.
27. The report records that the primary approach in conducting the review was to interview key staff and relatives of certain residents. The Mowat Report therefore records the matters raised from these discussions. Ms Mowat also refers to seeing two patient records.
28. Under the heading "Addressing the terms of reference" Ms Mowat provides a summary of certain problems at Lynde House. These include comments on management in section 4.3, stating that the level of complaints provides evidence of a failure to manage Lynde House effectively and on clinical care and supervision (section 4.5) which raises issues about staff shortages, lack of specialist care and problems with training. The Mowat Report also has a "recommendations" section which deals with matters such as putting in place strong management arrangements. The members noted that the Mowat Report does not contain any references to Dr Patel or any comments on whether or not he was involved with Lynde House.

The McLaren Report

29. The McLaren Report was commissioned by the Kingston and Richmond Health Authority. The report states that the independent review commenced in December 2001 and the final report is dated May 2002. It is recorded that during this period Lynde House was a nursing home owned by WHC which it had operated since 1996. WHC was registered by the Kingston and Richmond Health Authority in accordance with the Registered Homes Act 1984 and the Nursing Home and Mental Nursing Homes Regulations 1984. The 1984 Act and the Regulations contain provisions to regulate and enforce standards within the independent and voluntary healthcare sector (nursing homes, independent hospitals and clinics). The McLaren Report is stated to be a review of Lynde House applying the standards required by the 1984 Act and the Regulations. In essence, it is the Health Authority's duty to ensure homes are up to a "safe and adequate" standard.
30. The report was based on announced and unannounced visits to Lynde House, telephone conversations, personal interviews and considering care documentation. The report sets out details of various concerns at Lynde House. These cover a variety of areas such as the management of staff, their level of responses and whether these are appropriate and the well-being and health of the residents. Within each area the report also records matters that were found not to be substantiated.
31. The report refers to interim measures which at that time had been undertaken by the Health Authority and these are set out in detail in appendix 5 to the report. It is noted in the McLaren Report that these measures were undertaken in conjunction with

WHC. The "concluding note" states that the McLaren consultancy's understanding from various sources is that since February 2002 there have been significant changes at Lynde House. The report refers to an inspection by the National Care Standards Commission having taken place. The report also records that provided the agreed interim action plan is met then a safe and adequate standard (as required by the 1984 Act) would be achieved by Lynde House.

32. The members noted that no evidence was given in the FPP proceedings (up to the stage when they were concluded) about the present conditions at Lynde House. CHRE does not know if the Complainants intended to put forward any evidence about these matters, although it was noted that after 30 April 2002 Dr Patel ceased to be CEO of WHC, and to have any involvement with WHC, therefore any such evidence would post-date any connection Dr Patel might have had with Lynde House.

Dr Patel's evidence

33. Dr Patel's counsel called him to give evidence in support of the application to strike out certain charges. The members noted that the FPP therefore had the opportunity to hear from Dr Patel direct and to ask him questions [D3/6 to 19] before making its decision on 7 February 2005.

Evidence when questioned by Dr Patel's counsel

34. The following points came out of Dr Patel's evidence when questioned by his counsel:
 - (a) Lynde House was part of the Westminster Senior Living division of WHC. Lynde House was one of 94 nursing homes within that division [D1/55 and 56].
 - (b) As CEO Dr Patel was responsible for 7,600 members of staff within the Westminster Senior Living division [D1/56].
 - (c) There were various levels to the management structure of WHC [D1/56]. Dr Patel had three key people who directly reported to him, the Chief Operating Officer, the Chief Financial Officer and another Officer with responsibility for other aspects of the business. Dr Patel records that the Chief Operating Officer had day to day responsibility for operational aspects of the business. At the level below this there were four main divisions, each of which had its own Managing Director with overall responsibility for running that division. Therefore there was a managing director for the Westminster Senior Living division which included Lynde House. Underneath the Managing Director there would then be three or four regional managers reporting to that person. Those regional managers would have full delegated responsibility.
 - (d) The 94 nursing homes within the Westminster Senior Living division were spread across England, Wales, Scotland and Northern Ireland [D1/57].
 - (e) Dr Patel stated that he did not have any direct managerial responsibility for Lynde House and that any such responsibilities were "defrayed" through the operational structure of WHC [D1/61]. Dr Patel added that he had no input into planning the budgets of Lynde House or recruiting staff, purchasing

equipment and deciding whether to use agency staff [D1/61]. Dr Patel stated that if he became involved it might be through a separate operational forum that met regularly and which might consider matters that impacted on all 94 facilities [D1/61]. Dr Patel also gave evidence [D1/66] that he could become aware of complaints about an individual home if the Managing Director of a sector thought the matter was sufficiently exceptional to be brought to the attention of the Executive Board [D1/66].

- (f) In terms of the management structure, Dr Patel's evidence was that there would be eight people between himself and the residents of any house, of which at least 6 would be qualified registered nurses [D1/63].

Evidence when cross examined by counsel for the Complainants

35. Dr Patel was cross examined for a day by counsel for the Complainants [D2]. Dr Patel stated [D2/18] that he first became aware of the Mowat Report at the time the complaint went through the GMC's screening process. Dr Patel said that he was "absolutely amazed" when it was disclosed to him that there was an earlier report in addition to the McLaren Report. Counsel for the Complainants has difficulties with her cross examination of Dr Patel because there are various issues about the admissibility of documents. However, on D2/27 she refers Dr Patel to an email dated 27 September 2001 addressed to him from a WHC employee, Margaret Jones. The FPP decided that this email was inadmissible because Ms Jones was not called to give evidence and it contained hearsay. A copy of the email had been provided to CHRE by the LHRG and was available to the members although the members took into account that it had not been considered by the FPP.
36. It is recorded on the transcript that the email attached a memo which provided information in relation to possible exclusions of certain residents from Lynde House. The Complainants' counsel asked Dr Patel questions about the reference in the memo to an "independent review" by Ms Mowat in response to the complaints. Dr Patel answered [D2/33] when he was asked whether he had read the "independent review" that "it is clear to see here, in this particular email this name is mentioned, yes". The members considered that this might make Dr Patel's earlier answer [D2/18] inconclusive.
37. As set out in charge 10, on or about 21 March 2001 Mrs Feride Alp wrote to Dr Patel raising a number of matters of concern about Lynde House. Dr Patel's evidence [D2/43] was that he was "in the loop" and involved once he had been informed there was a complaint and had seen Mrs Alp's letter. Dr Patel said [D2/46] that it was explained to him that there were a number of complaints going back a long way and that these complaints had been investigated in a variety of different ways.

Information and documents provided to CHRE by the LHRG

38. The members noted that they had seen the information and documents provided by the LHRG. However, the members were mindful that, in considering the FPP's decision, it should treat with caution any material which was not before the FPP and which the GMC and Dr Patel had not seen and had not had the opportunity to comment on.
39. Many of the matters raised in the information and documents provided by the LHRG concern aspects of the GMC's processes and approach in pursuing the complaint and matters concerning the judicial review proceedings. Whilst these are matters

that the LHRG might ask the GMC to address, the meeting considered that these matters were not strictly relevant to whether or not CHRE should exercise its discretion under section 29 of the Act.

40. The members noted that the LHRG's email dated 14 July 2005 refers to a "body of evidence that had not been submitted to open and public scrutiny at a hearing". LHRG's letter dated 18 July 2005 enclosed various documents, however, none of these disclosed evidence that might establish SPM by Dr Patel. However, CHRE does not know what additional evidence might exist and has only seen a limited number of documents. The members noted the reference to witness statements by the Complainants' counsel. The members therefore considered it appropriate to assume that there might be evidence capable of proving some or all of the matters set out to in the Mowat and McLaren Reports. There was no suggestion before the members that there is evidence of anything above and beyond that material and certainly no evidence which could link Dr Patel more directly to the conditions at Lynde House.
41. This was a complainant prosecution and due to changes in the GMC's Fitness to Practise scheme there will be no such new prosecutions in the future (although there are still some cases to be completed under the GMC's previous scheme). The members noted that the GMC could consider bringing a further complaint against Dr Patel if, for example, the Complainants had further evidence which was provided to the GMC.

CHRE's ability to refer cases where evidence was not before the FPP

42. The members noted that the *Truscott/Ruscillo* judgment does not restrict CHRE to only considering an FPP decision on its face. The Court of Appeal indicated (paragraph 78):

"Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed"
43. The members considered that CHRE might therefore refer a case to the Court because there was relevant material available that may have demonstrated SPM but which was not put before the tribunal. This was considered by the Court of Appeal in *Truscott/Ruscillo* who said (paragraph 82) that there may be cases where it is in the public interest that additional evidence should be placed before the Court on a reference under section 29. If CHRE brought a successful appeal on this basis, the case might be remitted to the disciplinary tribunal with a direction from the Court to consider further evidence.

The evidence needed to establish SPM by Dr Patel

44. The Complainants' counsel did not get to the stage of formally opening their case before the FPP although she made submissions in response to Dr Patel's applications. However, it appears from the note of Collins J's decision in the judicial review proceedings that the *Roylance* case was relied on to seek to establish that Dr Patel was responsible for the alleged events at Lynde House by virtue of being CEO of WHC. The members therefore considered the *Roylance* case.
45. In *Roylance* the Privy Council heard an appeal against the finding of SPM by the Professional Conduct Committee ("PCC") of the GMC in respect of the CEO of the

United Bristol Healthcare NHS Trust. Roylance was found guilty of SPM in failing to take action over a number of years in respect of two surgeons who had excessive mortality rates in carrying out certain operations (primarily paediatric cardiac surgery) and for failing to prevent an operation in respect of a specific individual. Roylance appealed the PCC's decision and one of the arguments raised on his behalf was that he was not liable for misconduct as a medical practitioner when at the same time he was CEO. The Privy Council rejected that argument on the basis that being CEO did not absolve that person of their duties as a medical practitioner. The Privy Council stated, amongst other things, that:

"In ordinary circumstances there is no doubt that a medical practitioner who holds the office of Chief Executive Officer of a hospital is perfectly entitled to leave the day to day clinical decisions to the professional staff of the hospital. His duty as a medical practitioner is adequately performed by such a course. But there may be circumstances in which more may be required of him. In such circumstances his medical skill and knowledge are undoubtedly relevant. Even if he does not have the specialised expertise of the particular area of medicine in which the problem arises, his general knowledge as a doctor will be of service..."

46. The Privy Council commented that what had to be shown was a sufficient link between the conduct and the profession of medicine saying that "precisely what that link may be and how it may occur is a matter of circumstances".
47. The members considered the particular circumstances in the *Roylance* case which established SPM in that case. In *Roylance* the CEO of the hospital was also a consultant radiologist who performed one clinical session a week. The two surgeons were members of the hospital where Roylance was CEO. Roylance had been made specifically aware that there was an excessive mortality rate in the patients of the two surgeons when performing certain procedures and had attended meetings at which the surgeons' high mortality rates were discussed. One of the specific matters alleged in the *Roylance* case was that the CEO failed to prevent an operation taking place when he knew there was a significant increased risk because of the surgeons involved. These were particular circumstances where the PCC and the Privy Council found that Roylance had a duty to intervene as a medical practitioner and failing to do so was deemed to be SPM.
48. The members noted there may be some inconclusive aspects to Dr Patel statements before the FPP about when he first became aware of the Mowat Report. However, the members considered that for the FPP to find SPM there would need at a bare minimum to be evidence that Dr Patel was aware of the situation at Lynde House before he received Mrs Alp's letter of 21 March 2001 and that after becoming aware of the alleged problems he failed to take steps as a medical practitioner which amounted to serious professional misconduct. Whilst the Mowat and McLaren Reports detail matters which understandably would have been of a concern to the relatives of those at Lynde House, the reports do not link these matters to conduct by Dr Patel. As noted by the Privy Council, there would need to be evidence showing circumstances where it was not enough for Dr Patel to rely on other professional staff (including those at Lynde House), to address the alleged issues. The members considered that this evidence would have to go beyond proving the underlying facts and matters set out in the Mowat and McLaren Reports and there is nothing to indicate (including the email, letters and documents from the LHRG) that such evidence is available or that it was available at the time of the FPP hearing. The members also considered that the Complainants are still entitled to ask the GMC to consider any further evidence the Complainants might have which they thought relevant.

49. The members gave weight to the views expressed by Collins J. It appeared that Collins J considered the *Roylance* case and the Mowat and McLaren Reports. Collins J's comments indicated that he would not have supported a finding of SPM and he questioned whether there was evidence showing misconduct by Dr Patel.

Undue lenience and public protection

50. The members noted the guidance of the Court of Appeal in the *Truscott/Ruscillo* judgment (paragraph 68) that although section 29(4)(b) of the Act does not refer to undue leniency, it seemed to the Court implicit that CHRE would not refer a case unless it considered the failure of the disciplinary tribunal to impose any penalty to be unduly lenient to the practitioner.
51. Based on the amended charges the FPP were considering and that no evidence was adduced on the charges not admitted by Dr Patel, the members considered the FPP's decision was not unduly lenient.
52. The members also considered whether the FPP's decision might be unduly lenient if it was the case that available evidence was not put before the FPP or such evidence was now available. CHRE does not know what evidence, if any, may have been available or may now be available. However, the members considered it appropriate to put the Complainant's case in a strong way by assuming that there may have been evidence that could have proved some or all of the matters set out in the Mowat and McLaren Reports. If it had been possible to adduce evidence of the matters set out in the Mowat and McLaren Reports, the members considered that, given the matters noted above, the FPP could still have reasonably decided (having regard to the object of such disciplinary proceedings) that Dr Patel was not guilty of SPM.
53. The members noted that Dr Patel has now ceased to be involved with WHC and Lynde House. The members also noted that Dr Patel has not been involved in clinical practice since 1985. Given these facts and the matters noted above, the members considered that Dr Patel's case did not raise public protection issues that would make it desirable to refer the case to Court.

Conclusion

The members concluded that:

1. CHRE had jurisdiction under section 29(4)(b) of the Act to consider whether or not to refer this case to the High Court.
2. Based on the matters noted by the members at paragraphs 1 to 49 above, the relevant decision of the FPP of the GMC to find Dr Patel not guilty of SPM was not unduly lenient. Given these matters and those in paragraphs 50 to 53 above, the decision also did not raise public protection concerns that would make it desirable to refer this case to the Court.
3. Accordingly, the criteria of section 29 of the Act was not satisfied and the members decided that CHRE would not refer this case to the Court.

Peter North (Chair)

Date: