



Neutral Citation Number: [2023] EWHC 926 (Admin)

Case No: CO/4421/2022

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/04/2023

**Before:**

**MR JUSTICE GARNHAM**

**Between:**

**Professional Standards Authority for Health and  
Social Care  
- and -  
Social Work England**

**Appellant**

**and**

**First  
Respondents**

**JS**

**Second  
Respondent**

-----  
-----  
**David Hopkins** (instructed by **Browne Jacobson LLP**) for the **Appellant**  
**Harini Iyengar** (instructed by **Bates Wells and Braithwaite London LLP**) for the **First  
Respondents**

Hearing dates: 23 March 2022  
-----

**Approved Judgment**

This judgment was handed down remotely at 10:30am on 25 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE GARNHAM

## **Garnham J :**

### Introduction

1. The court has made an order that there be no publication of the names of the children of the Second Respondent (JS) and no publication of anything that might lead to their identification.
2. On 22 September 2022, a panel of adjudicators established by the First Respondents, Social Work England (“the Regulator” or “SWE”), decided that the fitness to practise of JS, the Second Respondent (hereafter “the Registrant”) was impaired on the basis of a health condition, and on the basis of her inclusion in the “Children’s Barred List” and the “Adults’ Barred List” maintained by the Disclosure and Barring Service (“the DBS”). The panel suspended the Registrant from practising as a social worker for 2 years.
3. The Professional Standards Authority for Health and Social Care, the appellant, appeals against those decisions pursuant to s29 of the National Health Service Reform and Health Care Professions Act 2002 (the “2002 Act”). It does so on two grounds. It contends that:
  - i) the First Respondent was wrong to conclude that a suspension order was a sufficiently serious sanction to protect the public; and
  - ii) the decision was unjust because of a serious procedural or other irregularity, in that SWE failed to allege before the panel that the Registrant’s fitness to practise was impaired by reason of her misconduct.
4. I heard this appeal on 22 March 2023. I am grateful to Mr David Hopkins for the Appellant and Ms Harini Iyengar for the First Respondent for their detailed skeleton arguments and helpful oral submissions. The Registrant did not appear and was not represented. She sent her apologies for not attending but made no application for the adjournment of the hearing.

### The Statutory Framework

5. It is convenient to identify at the outset the relevant strands of the statutory arrangements for the regulation of social workers, and for the operation of barring orders, namely (i) the statutory grounds for the establishment of SWE, its statutory objectives, responsibilities and powers in fitness to practise cases; (ii) SWE’s relationship with the former regulator, the Health and Care Professions Council (“the HCPC”); (iii) the powers and responsibilities of the DBS and (iv) the powers of the appellant to refer matters to the High Court.

### *Social Work England*

6. “Social Work England” was established, and recognised as “the regulator” of the social work profession, by s36(1) of the Children and Social Work Act 2017 (the “2017 Act”). Pursuant to s37 the over-arching objective of Social Work England in exercising its functions is the protection of the public. By s37(2):

The pursuit by the regulator of its over-arching objective involves the pursuit of the following objectives—

- (a) to protect, promote and maintain the health, safety and well-being of the public;
- (b) to promote and maintain public confidence in social workers in England;
- (c) to promote and maintain proper professional standards for social workers in England.

7. By s44(1) The regulator must—

- (a) make arrangements for protecting the public from social workers in England whose fitness to practise is impaired, and
- (b) make arrangements for taking other disciplinary action against social workers in England.

8. In exercise of powers provided, inter alia, by section 29(2A) of the 2002 Act, and 67(2) of the 2017 Act, the Secretary of State made the Social Workers Regulations 2018 (“the Regulations”).

9. Regulation 25 makes provisions for fitness to practise proceedings. It provides:

(1) Where a question arises as to a social worker's fitness to practise by reason of any of the grounds in paragraph (2), and regulation 26(5) does not apply, the regulator must ensure that—

- (a) proceedings are carried out in accordance with this regulation and Schedule 2, and any rules made under paragraph (5) (“fitness to practise proceedings”)...

(2) The grounds referred to in paragraph (1) are—

- (a) misconduct,
- ...
- (e) adverse physical or mental health,
- ...
- (g) being included—

(i) by the Disclosure and Barring Service in a barred list (within the meaning given in section 60(1) of the Safeguarding Vulnerable Groups Act 2006 ...).”

(4) The standard of proof applicable to fitness to practise proceedings is that applicable to civil proceedings.

(5) The regulator must make rules setting out—

- (a) the criteria by which it will determine, pursuant to paragraph 1(1) of Schedule 2, whether there are reasonable grounds for investigating whether a registered social worker's fitness to practise is impaired,
- (b) the timescales within which any steps in fitness to practise proceedings are to be taken,
- (c) any requirements and restrictions in relation to who may be appointed as an adjudicator, case examiner or investigator in fitness to practise proceedings,

and may make rules setting out the detail of any other aspect of fitness to practise proceedings...

10. Schedule 2 contains further detailed rules on fitness to practise proceedings. Paragraph 13 of Schedule 2 provides:
- (1) A final order may—
    - (a) require the removal of the social worker's entry from the register (a "removal order"),
    - (b) suspend the social worker from practising for such period as is specified in the order (a "suspension order"),
    - (c) impose a restriction or condition with which the social worker must comply for such period as is specified in the order (a "conditions of practice order"),
    - (d) give a warning to the social worker regarding their future conduct or performance (a "warning order").
  - (2) A removal order may only be made in a case where—
    - (a) the adjudicators found the social worker's fitness to practise to be impaired on one or more of the grounds set out in regulation 25(2)(a), (c), (d), (f), or (g),
    - (b) the adjudicators found the social worker's fitness to practise to be impaired on one or more of the grounds set out in regulation 25(2)(b), (e) or (h) and the social worker was either suspended from practice, or subject to a conditions of practice order, or a combination of both, for a continuous period of two years immediately preceding the day when the removal order took effect, or
    - (c) the case examiners—
      - (i) found that there was a realistic prospect that the adjudicators would make a determination that the social worker's fitness to practise was impaired on one or more of the grounds set out in regulation 25(2)(a), (c), (d), (f), or (g), and
      - (ii) have both disposed of the case in accordance with paragraph 9(3)(a) and informed the persons specified in paragraph 9(3)(b).
11. Under paragraph 15(1), the Regulator must review a suspension order before its expiry. The Regulator is empowered on review to extend a suspension order or impose a removal order.

*The Health and Care Professions Council*

12. SWE assumed the role of Regulator from its predecessor, the HCPC, on 2 December 2019 pursuant to regulation 2 of the Children and Social Work Act 2017 (Commencement No 6 and Saving Provision) Regulations 2019.
13. Any HCPC case which was awaiting determination on that date was transferred to SWE under regulation 16 of the Children and Social Work Act 2017 (Transitional and Saving Provisions) (Social Workers) Regulations 2019.

*The Disclosure and Barring Service*

14. Section 1 of the Safeguarding Vulnerable Groups Act 2006 (the "2006 Act") established the Independent Safeguarding Authority (the "ISA") and set out its role in relation to regulated activities with children and vulnerable adults.

15. Sections 87 and 88 of the Protection of Freedoms Act 2012 provided for the creation of the DBS and empowered the Secretary of State to transfer functions under the Safeguarding Vulnerable Groups Act 2006 from the ISA to the DBS. He did so by the Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012. The powers and duties of the ISA, as set out in the 2006 Act, now lie with the DBS.
16. The activities regulated by the 2006 Act include social work. The DBS is now required by section 2 to maintain the Children’s Barred List and the Adults’ Barred List. Section 3 provides that a person is barred from regulated activity if she is included in the Children’s Barred List or the Adults’ Barred List. Section 4 provides an appeal to the Upper Tribunal against a barring decision. Section 7 provides that it is an offence for a barred person to engage in regulated activity, and sections 9, 18 and 19 contain associated offences for other persons who permit, supply, consent, connive in or allow through neglect a barred person to engage in regulated activity.
17. Under paragraph 18 of Schedule 3, a person subject to a barring decision can apply for permission for the barring decision to be reviewed after 10 years has elapsed. However, by paragraph 18A of Schedule 3, the DBS may review a barring decision at any point if, inter alia, there is new information or a change of circumstances relating to the person concerned.

*Referral to the High Court*

18. Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (“the 2002 Act”) empowers the Appellant to refer fitness to practise decisions made by the Regulator, here the First Respondent, to this Court:

(2A) This section ... applies to any steps or decisions which are taken by Social Work England (or any of its committees or officers) in connection with fitness to practise or discipline and which are of a description specified in regulations made by the Secretary of State.

(3) The things to which this section applies are referred to below as “relevant decisions”.

(4) Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

(4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient –

- (a) to protect the health, safety and well-being of the public;
- (b) to maintain public confidence in the profession concerned; and
- (c) to maintain proper professional standards and conduct for members of that profession.

(5A) In relation to something that is a relevant decision as a result of subsection (2A), “the relevant court” means the High Court of Justice in England and Wales.

...

(7) If the Authority does so refer a case –

- (a) the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision (even though the Authority was not a party to the proceedings resulting in the relevant decision), and
- (b) the body which made the relevant decision (as well as the person to whom the decision relates) is to be a respondent.

(7A) In a case where the relevant decision is taken by a committee, the reference in subsection (7)(b) to the body which made the decision is to be read as a reference to the body of which it is a committee.

(8) The court may –

- (a) dismiss the appeal,
- (b) allow the appeal and quash the relevant decision,
- (c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned,
- (d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court ... and may make an order as to costs... as it thinks fit

### The History

19. In about 2014, the Registrant was engaged by Suffolk County Council (“SCC”) as a student social worker. On graduation, she was registered as a social worker and became permanently employed by SCC in its Children and Young Person service. In about September 2016 the Registrant was diagnosed with bipolar affective disorder (hereafter “Bipolar”).
20. On 15 March 2017, the Registrant, together with a colleague, made a home visit in her capacity as social worker to a client (or “service user”). It rapidly became apparent to her colleague that the Registrant was under the influence of alcohol and the colleague reported the matter. On 28 March 2017, SCC referred the Registrant to the HCPC. The Registrant was also suspended from work and subjected to disciplinary proceedings by the County Council. She subsequently resigned from her employment and has not worked as a social worker since.
21. On 14 August 2017, the HCPC’s Investigating Committee decided that there was a case to answer in respect of the Registrant’s misconduct on 15 March 2017. This case was referred to before me as relating to “*the first behaviour*”.
22. On 7 November 2017, SCC’s Local Authority Designated Officer (“LADO”) received a referral from a senior mental health nurse in the County Council’s eating disorders team in relation to the Registrant’s child. The referral set out concerns about the Registrant’s engagement with her family members as a result of her alcoholism and her Bipolar, and the impact of her excessive drinking and cannabis use. The referral noted verbal abuse, threats by the Registrant to take her own life, made in front of her own children, and threats that she would drive with her children whilst under the influence of alcohol.

23. The LADO held a strategy meeting on 13 November 2017 when it was decided that a social work assessment would be completed. The report of that assessment, dated 23 December 2017, concluded that “*based on factors of concern identified during the assessment process*” the Registrant’s children had been neglected and emotionally abused. This case was referred to before me as relating to “*the second behaviour*”.
24. The LADO held a further strategy meeting on 14 December 2017, at which it was decided that a disciplinary process should be commenced. However, by then the Registrant had resigned. The LADO process was concluded as “*substantiated*”, meaning in effect that the allegations were treated as proven. The council also referred the Registrant to the DBS.
25. As part of the HCPC’s investigation, in February 2019 the Registrant was assessed by a consultant psychiatrist, Dr Geoff Isaacs. Dr Isaacs identified concerns regarding the Registrant’s alcohol and cannabis use and noted (at paragraph 63-64) the Registrant’s diagnosis of bipolar affective disorder.
26. Dr Isaacs commented on the Registrant’s ability to engage in professional activity as a social worker. He recommended that she abstain from alcohol and cannabis use for at least 12 months and her mental health be reassessed thereafter. Despite that recommendation, the Registrant did not respond to repeated attempts to arrange further follow up assessments in order to enable the preparation of an updated psychiatric report.
27. The HCPC then applied to transfer the fitness to practise proceedings from its Conduct and Competence Committee to its Health Committee. The Health and Care Professions Tribunal Service (“HCPTS”) conducted a preliminary hearing on 28 August 2019 in relation to “the first behaviour”. The HCPTS decided that the allegation against the respondent should be dealt with as a health matter, and not as a misconduct matter. In the course of its ruling, the HCPTS noted that the “misconduct allegation appeared to result directly from the Registrant’s health condition. The panel was satisfied that this matter would be more properly dealt with as a health matter.”
28. The HCPTS added

“the panel observed that the HCPC has not sought to include the issue of the registrant’s use of alcohol or cannabis when describing the Registrant’s health conditions...The panel notes that in his report of 18 March 2019, Dr Isaacs did not suggest that the formal diagnosis relating to alcohol or cannabis use was appropriate. However the panel suggests that those preparing the case for substantive hearing may wish to give further consideration, and or consult further with Dr Isaacs, regarding whether the allegation should be further amended to properly reflect the Registrant’s health conditions.
29. As well as transferring the matter to the HCPC Health Committee, the HCPC panel allowed an application by the HCPC to amend the allegations. The allegations had originally read:

“1...during the course of your employment with Suffolk Council as a social worker, you, on 15 March 2017, attended a

prearranged joint home visit of a service user whilst under the influence of alcohol.

2. The matter set out in paragraph 1 constitutes misconduct; ...by reason of your misconduct your fitness to practise is impaired.”

30. After the amendment the allegation read “*by reason of your mental and or physical health as set out in schedule A your fitness to practice as a social worker is impaired. Schedule A; You suffer from bipolar effective disorder*”.
31. On 29 August 2019, in response to the referral referred to at paragraph 24 above, the DBS included the Registrant in its Child Barred List and its Adult Barred List. The DBS’s reasons for including the Registrant in those lists was that “*on 15 March 2017 [she] attended a home visits in [her] capacity as a social worker under the influence of alcohol [and] on a date prior to November 2017 [she] neglected the basic care and emotional needs of [her own] children.*” The DBS found amongst other things that the Registrant had “*failed to recognise the significant shortcoming in meeting [her] own children’s welfare needs subjecting them to neglect and emotional harm.*”
32. On 2 December 2019, SWE took over from the HSCPC responsibility for the fitness to practise proceedings concerning the Registrant. Unlike the HSCPC, the SWE is a single decision-making body, the adjudicators of which are able to consider all fitness practice proceedings, both health and misconduct, together.

#### The hearings before the panel

33. At a case management hearing on 19 May 2022 the allegations concerning the first behaviour, the attendance on the home visit whilst under the influence of alcohol, and the second behaviour, the registrant’s neglect of her own children, were formally joined so that both sets of fitness to practise proceedings could be heard together. Thereafter the allegations against the Registrant were as follows:

##### “Allegation 1

By reason of your mental and or physical health as set out in Schedule A your fitness to practise as a social worker is impaired.

Schedule A. You suffer from bipolar affective disorder.

##### Allegation 2

Whilst registered as a social worker and whilst you were employed in Suffolk County Council you were subject to findings of the disclosure and barring service in that on 15 March 2017 you attended a home visit in your capacity as a social worker under the influence of alcohol and on dates prior to November 2017 you neglected the basic care and emotional needs of your children, which resulted in you being included in the disclosure and barring services, Children’s barred list and adult’s barred list. Your fitness to practise is impaired by reason



of being included by the Disclosure and Barring service in a barred list.”

34. On 20, 21, and 22 September 2022, the First Respondent conducted a hearing under part 5 of the Social Workers Regulation 2018. The Registrant did not attend and was not represented. The first respondent was represented by counsel. An application by the Registrant for the postponement of the hearing was refused and the panel resolved to conduct the proceedings in her absence. The panel also decided to hold the hearing into both allegations in private in accordance with rule 38 of the rules.
35. The panel considered the hearing bundles and heard evidence from three witnesses called by the First Respondent. First, they heard expert evidence from Dr Isaacs who confirmed the contents of his report of the 18 March 2019 and answered supplementary questions. The panel heard from a family support practitioner from SCC who had conducted the joint visit to the service user with the Registrant on 15 March 2017. They also heard from the SCC’s LADO who received a referral relating to the registrant from a health professional involved in the care of one of the Registrant’s children.
36. During the course of his evidence Dr Isaacs said this about the Registrant:

“There is no doubt that she had mood disorders. The question is whether she'd had manic or hypomanic episodes that would give the diagnosis of Bipolar. Also the question was whether or not when she had -- there does not appear to have been real manic episodes. Even hypomanic episodes could have been under the influence of all sorts of different things, alcohol and drugs. So, I was not very convinced, but several experts had seen her and had been convinced. So, I was not going to question them entirely, but I wanted to put the point that I think Bipolar may not be as clear cut as they had thought.”
37. Dr Isaacs was asked whether it was possible to separate the bipolar condition from the drug and alcohol misuse. He replied:

“There are different schools. Some people say that you are Bipolar even if it is due to alcohol and drugs. Some people say, and I think I am more in this school, that you really have to see it in the context of what was going on. Again, I need to stress the evidence that she was actually hypomanic was not great. The only reason that I put weight on this was that several other experts had seen her nearer the time and had reached that diagnosis. I could not completely exclude their view.”
38. At the conclusion of the hearing, the adjudicators reached the following conclusions as to the Registrant’s fitness to practise:

“54. The panel concluded that, given the lack of up-to-date medical reports to the contrary, there is currently a risk of further depressive and hypomanic episodes, together with a risk that [the Registrant] would not take steps to manage her health...

Consequently, the panel concluded that [her] fitness to practise is impaired by reason of her mental ill health.

55. The panel also decided that [the Registrant's] fitness to practise is impaired because she has been included in the DBS Children's Barred List and Adults' Barred List. This decision prevents [the Registrant] carrying out any regulated activity with children or vulnerable adults...

56. The current position is that [the Registrant] is included in the Barred Lists on an indefinite basis. The panel decided that informed members of the public would be very concerned if a finding of impairment was not made by the regulator, given that [the Registrant] is included in the Barred Lists...

57. Therefore the panel concluded that [the Registrant's] fitness to practise is currently impaired on the basis of her health condition and on the basis of her inclusion in the DBS Children's Barred List and Adults' Barred List."

39. As to sanction, the panel determined

"69. The panel next considered the guidance in the SG (Sentencing Guidance) for a suspension order...

70. The panel considered that a suspension order would be sufficient to protect the public because it would protect service users. It would give [the Registrant] the opportunity to engage with treating health professionals, and work towards the suggestions in Dr Isaac's report for managing her health.

71. ...The panel has also found impairment on the ground of [the Registrant's] inclusion in the DBS Barring Lists and the panel therefore has the power to impose a removal order. The panel decided that a removal order would be disproportionate at this stage...

72. ...In the panel's judgment it would be proportionate at this stage to impose a sanction which would enable her to engage with a rehabilitative process if she is able and wishes to do so.

73. The panel considered that a suspension order was a sufficiently serious sanction to maintain public confidence in the profession. It is a sanction which takes into account the overlapping nature of the grounds of impairment, but also sufficiently addresses the need for a sanction to mark the public interest by preventing a social worker on the Barred Lists practising as a social worker...

75. In the panel's judgment this is a case involving chronic ill health where a longer period of suspension was appropriate,

proportionate, and in the best interests of [the Registrant]. The panel was of the view that the programme suggested by Dr Isaacs was long term, involving Ms [the Registrant] demonstrating abstinence for at least twelve months, followed by further assessment and health management. [The Registrant] may also require time to develop insight before she is in a position to embark on a rehabilitation programme. The panel took into account the impact of a long suspension order, including deskilling, but decided that a longer period of suspension is appropriate. [The Registrant] has not worked as a social worker since 2017 and therefore it is likely that some degree of deskilling has already taken place.

76. The panel decided that a suspension order of two years was appropriate and proportionate. This imposition of this order is likely to have a detrimental impact on [The Registrant], but the panel decided that her interests were outweighed by the need to protect the public and the wider public interest.”

#### Principles from the caselaw

40. There was little dispute between the parties before me as to the relevant principles that emerge from the case law. As to the requirements on the adjudicators, these can be summarised as follows:
- (i) The most fundamental purpose of the regulator is to maintain the reputation of the profession (*Bolton v The Law Society* [1994] 1 WLR 512 at 518H). “*The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price*” (519E).
  - (ii) The primary object of professional regulatory regimes is not to penalise for misconduct but to protect the public (*Council for the Regulation of Health Care Professionals v GMC and Ruscillo* [2005] 1 WLR 717, [60]).
  - (ii) The task of a disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been found proven to have committed the defined professional misconduct that gives rise to the right or duty to impose a sanction and, where they do, to impose a sanction that is appropriate, having regard to the safety of the public, the reputation of the profession and the need to promote and uphold proper professional standards (*Ruscillo* [73]).
  - (iii) A disciplinary tribunal must play a more active role than a judge presiding over a criminal trial in making sure that the case is properly presented and relevant evidence is adduced (*Ruscillo* [80]).
  - (iv) The consideration given to public confidence in a profession must reflect the views of an informed and reasonable member of the public (*Giele v GMC* [2006] 1WLR 942 [33]).
  - (v) The tribunal must give reasons for its decisions. But the adequacy of the reasons will depend on the nature of the case (per Wall LJ in *Phipps v GMC* [2006] EWCA 397 at [77]) and the panel is not expected to give reasons to the same standard as a court. Rather it will generally be sufficient for the reasons to demonstrate to the parties, and to an appellate tribunal, why they considered the

sanction imposed to be appropriate, and why alternative sanctions were not appropriate (*Moyo v Nursing and Midwifery Council* [2016] 4 WLR 11 at [13]).

41. As to the role of this court, the principles that apply can be summarised in this way:
- (i) The role of the appellate Court is to consider whether the disciplinary tribunal has properly performed its task so as to reach the correct decision as to the imposition of the sanction (*Ruscillo* [73]).
  - (ii) An appeal from a fitness to practise tribunal is by way of review, not rehearing. The task of the appellate court is to determine whether the decision of the tribunal was wrong (*Ruscillo* [71]).
  - (iii) To succeed in this jurisdiction, the Appellant must show either the decision was not one which the adjudicators could reasonably have reached or that there was a serious procedural irregularity, such as a failure to comply with the duty to give adequate reasons (eg *PSA v Social Work England and Bennett* [2021] EWHC 3593 (Admin) at [75]).
  - (iv) Intervention by the Court will be justified where, because the sanction is inadequate, the public remains at risk (para 61) including where the reason is undue leniency (*Ruscillo* [68]).
  - (iii) If the Court decides that the sanction was “wrong” it must allow the appeal and quash the decision, then it may either substitute its own decision or remit the case (*Ruscillo* [71]).
  - (iii) If the Court decides that there has been a serious procedural irregularity it may be unable to decide whether the sanction was appropriate or not and then can allow the appeal and remit the case with directions as to how to proceed (*Ruscillo* [72]).
  - (iv) Where all material evidence has been placed before a disciplinary tribunal and it has given due consideration to the relevant factors, the Court should place weight on the expertise brought to bear by the decision maker, unless a procedural failure requires reassessment of the decision (*Ruscillo* [78]).
  - (vi) If a disciplinary body were to fail to give adequate reasons for its decision, including in regard to the consideration which it gave to whether to take action to ensure the protection of the public, then that would be a serious procedural irregularity which would engage the Court’s jurisdiction on appeal (*Council for the Regulation of Healthcare Professionals v General Dental Council and Marshall* [2006] EWHC 1870 (Admin) [31-32]).
  - (vii) In considering whether there has been undercharging by a regulator, the Court should ask: (a) on the evidence, and applying its own rules, should the regulator have included further allegations in the charge; (b) if so, did the failure to include those allegations in the charge mean that the Court is unable to determine whether the sanction was unduly lenient or not (*PSA v General Chiropractic Council and Briggs* [2014] EWHC 2190 (Admin) [21]).
  - (viii) If a regulator were to fail to bring the real burden or substance of what has gone wrong with the registrant’s practise to the attention of the panel and the charges did not address the fundamental problem, then that “undercharging” would be a serious procedural irregularity (*PSA v NMC and Jozi* [2015] EWHC 764 (Admin) [22-28]).
  - (xi) Issues regarding public confidence in a profession should be assessed by reference to the standard of the “ordinary intelligent citizen” who is reasonably well informed about the issues raised by the case and not by taking into account

the perceptions of someone who is ill-informed or uninformed (*Wallace v Secretary of State for Education* [2017] PTSR 675, [92] and [96(5)]).

- (xiii) A decision to suspend rather than remove is a multi-factorial decision which is a mixture of fact and law. The appellate court should interfere only if there has been an error of principle in carrying out the evaluation or if, for any other reason, the evaluation was wrong in that it fell outside the bounds of what the tribunal could properly and reasonably decide (*GMC v Bawa-Garba* [2019] 1 WLR 1929, paras 60-67; and *GMC v Mok* [2022] EWHC 165 (Admin)) 14.

### The competing contentions

42. At my invitation the parties addressed the two grounds in reverse order. I made that request because it seemed to me that the formulation of the charges inevitably framed the panel's consideration of the case and therefore it was logical to consider the adequacy of the charging decision first.
43. As to ground 2, Mr Hopkins said that the First Respondent inherited HSCPC's decision making as to the amendment of the allegations, the effect of which was to exclude a charge that the Registrant's fitness to practise was impaired by reason of her misconduct and include only a charge that it was impaired by reason of her health. He said that SWE was not fettered by HSCPC's decision and, prior to the hearing before the panel, should have further amended the charges to re-include an allegation that her fitness to practise was impaired by reason of misconduct. When the Panel was presented with the allegations at the hearing, it should have adjourned with directions that SWE consider whether the charges should be amended to include such an allegation. The failure to take those courses of action is a serious procedural irregularity which renders the Decision unjust.
44. He says the Registrant's attendance at a home visit on 15 March 2017, while under the influence of alcohol, was a matter which could amount to misconduct. Her neglect and emotional abuse of her own children was a matter which could amount to misconduct notwithstanding that it occurred in her private life. This background might well have been connected to the Registrant's health problems, but there was no basis for concluding, as the panel appears to have done, that the former incident was not misconduct because it was entirely attributable to her health condition. There was no allegation before the Panel that the Registrant's fitness to practise is impaired because of her alcohol dependency. The only allegation of impairment due to health was with regards to the Registrant's Bipolar and the evidence before the Panel went no further. Had SWE alleged, as it ought to have alleged, that the Registrant's fitness to practise was impaired by reason of her misconduct, the Panel's decision as to sanction could have been different.
45. As to ground 1, Mr Hopkins argued, on behalf of the Appellant, that anything less than removal of the Registrant from the register of social workers was insufficient for the protection of the public because any lesser sanction was insufficient to maintain public confidence in the profession and proper professional standards and conduct in the profession.
46. He pointed out that the maximum suspension the panel could have imposed would expire in 2025 and, absent a successful review, the Registrant will remain on the Barred

Lists until 2029. He said that the public's confidence in the social workers' profession is diminished if the public is aware that a social worker's regulator considers a person in the position of the Registrant should receive a sanction which prevents them from working as a social worker for a period considerably shorter than that for which they have been barred from working by the DBS. For the same reasons he said that a suspension was insufficient to maintain proper professional standards and conduct for members of the social workers' profession.

47. Referring to *Bolton*, he argued that the panel erred by finding that maintenance of public confidence in the profession could be balanced against the Registrant's "*interest in continuing to practise as a social worker*".
48. He pointed out that the DBS included the Registrant in its Barred Lists because she had attended a home visit in her capacity as a social worker while under the influence of alcohol; and neglected and emotionally abused her own children. Those, he said, were powerful pointers toward the conclusion that the Registrant's actions were fundamentally incompatible with her remaining on the register.
49. In those circumstances, Mr Hopkins invites me to allow the appeal, quash the decision of the panel and substitute for the suspension an order removing the Registrant from the register of social workers maintained by SWE. In the alternative he invites me to remit the matter to be heard by a fresh panel of adjudicators of SWE.
50. The Regulator's case on the second ground is that there was no procedural irregularity because, in the "real-life context" of what evidence was and was not available to them, the adjudicators fully considered the relevant factual circumstances concerning the Registrant's fitness to practise in regard to both her health condition and the barring decision taken by the DBS. Ms Iyengar says the DBS's decision to bar the Registrant did not include a conclusion that the Registrant had committed alcohol-related misconduct which the adjudicators were obliged to import into their Decision.
51. There was, she argued, no substantive omission either to make relevant findings of fact nor to undertake the required level of analysis about what the Registrant had done or why she had done those things. A fair procedure was used which avoided unfairly subjecting the Registrant to multiplicitous charges arising from the same behaviours by the Registrant.
52. In response to ground 1, Ms Iyengar submits that the Appellant cannot succeed because it cannot show that the decision to suspend was outside the range of reasonable decisions open to the panel. Ms Iyengar says that the specialist adjudicators here acted properly and in accordance with the discretion given to them by Parliament when they imposed a long suspension. The statutory scheme does not make removal from the Register a necessary consequence of DBS barring in every case. Removal from the Register solely because of a health condition is not even an option open to the adjudicators under the statutory scheme. On the facts of the case, the public and the public's confidence in the social work profession are protected by the combination of the barring by the DBS and the long suspension, which must be reviewed before its expiry and can, following that review, be extended or a removal order imposed, by the Regulator. That, she argues, ensures that the Registrant will be unable to practise as a social worker again unless and until she is fully rehabilitated and no longer barred by the DBS.

53. Ms Iyengar argued that whether a suspension order was sufficient to maintain public confidence in the social workers' profession must be considered in light of the fact that the statutory scheme empowers the adjudicators to give significant weight to the rights of social workers with chronic ill-health or disability. The statutory scheme prevents adjudicators from removing social workers solely for physical or mental health conditions, unless they have first been suspended continuously for two years. She says an informed and reasonable member of the public would not find the sanction of a two-year suspension – as opposed to a removal order – “*a matter of disappointment or outrage*”, in the case of a registrant who has been diagnosed with a serious mental health condition, for which she has been prescribed medication and for which she remains under the care of doctors. She contends that a reasonably informed member of the public would understand that the statutory scheme does not require the Regulator to remove every social worker who is barred by the DBS and that it is in the public interest and proportionate for the Regulator to show empathy and compassion towards social workers with chronic ill-health or disability, so that skilled social workers who can be rehabilitated and serve the public in future are not lost to the workforce.
54. She says the Regulator and the DBS play different roles within the statutory scheme. It may well be that it was not open to the DBS to display the understanding and compassion towards the Registrant which the adjudicators were able to, because the DBS and the Regulator have different duties and powers; it was open the adjudicators to do so. The fact that the DBS took a different approach from the Regulator is not a sign that a procedural mishap must have occurred. Overall, the different actors within the statutory scheme have successfully created an outcome in which children and vulnerable adults are protected from the potential risk of harm by a rigorous set of rules which prevent the Registrant from undertaking regulated activities whilst DBS barred, whilst the vulnerable Registrant is also treated with compassion by her Regulator. Therefore, overall, public confidence in the social workers' profession remains high from the standpoint of the ordinary intelligent citizen. Social workers with knowledge of the suspension would also feel confident that professional standards were being maintained, for the same reasons.

### Discussion

55. Like counsel, I will address the two grounds in reverse order.

#### *Ground 2*

56. The charges before the panel required its members to consider two issues, whether as a result of her Bipolar, the Registrant's fitness to practise was impaired, and whether, as a result of her inclusion on the children and adult barring list maintained by the DBS, her fitness to practise was impaired.
57. Neither charge required the panel to address the underlying issue of the Registrant's conduct in order to find the charge proven; the question of her Bipolar diagnosis turned on a question of fact as to whether she had been so diagnosed; the second charge turned on the undisputed fact that she was the subject of a barring order. It is true that in considering sanction the panel did give some consideration to the evidence as to the nature of the Bipolar condition and the grounds on which the DBS had made their order. But the formulation of the charges took the focus of the panel's attention away from the Registrant's conduct and onto the two specific issues in the allegations.

58. If it could be shown on the evidence that all the conduct in issue was clearly a result of her medical condition that might be unobjectionable. But that was not the case. At paragraph 63-64 of his report, which he confirmed at the hearing, Dr Isaacs said this:
- “63. [The Registrant] has received a diagnosis of Bipolar Affective Disorder, Type 2, which was based on at least two episodes of what appears to have been manic behaviour, or at least hypomanic behaviour during which she was energised and unable to sleep, with some pressure of speech and flight of ideas. This, in itself, would normally be good evidence of Bipolar Affective Disorder, but it needs to be seen in the context of enormous stress, alcohol and drug consumption and the fact that it was not felt that there was an elated mood.  
64. Nevertheless, it is quite likely that [the Registrant] does suffer from Bipolar Affective Disorder.”
59. At paragraph 47 of its decision, the panel interpreted that passage as establishing that Dr Isaacs had said that “*it is not possible to separate*” the diagnosis from the context which included “*enormous stress, alcohol and drug consumption*”. But that is not what he said. He said the bipolar diagnosis needed to be seen in the context of those other difficulties; in other words that the reader needed to understand that the Registrant was affected by these other stressors in addition to the bipolar condition. He did not say it was not possible to separate the two.
60. An attempt was made to test the point in questioning at the hearing. Dr Isaacs was asked whether it was right that “*you cannot separate one (the diagnosis) from the other (the drink and drugs)*”. He said that there were two schools of thought on whether a person can be Bipolar “*if it is due to alcohol and drugs*”. He was not in the school that said that that was possible; in other words he did not share the opinion that bipolar could be caused by drink and drugs. Critically, he was *not* asked whether the reverse was true, namely whether bipolar could cause the misuse of drink or drugs.
61. In fact, there was no evidence before the panel that that might be the case; by no-one was it suggested that the Registrant’s misuse of drink and drugs could be a function of her Bipolar condition. As noted at paragraph 28 above, in the preliminary hearing conducted by the HCPTS on 28 August 2019, the conduct and competence panel had addressed the point expressly. They had noted that the use of alcohol or cannabis was not included as part of the Registrant’s health conditions and that Dr Isaacs had not suggested that a formal diagnosis relating to alcohol or cannabis use was appropriate. They had suggested that Dr Isaacs might be consulted again on the topic. However, as it turned out, Dr Isaacs was not asked about the issue during his evidence, and there was no further report from him. No further amendment was ever made to the charges to suggest that the Registrant’s use of alcohol or cannabis was an element or consequence of her health condition.
62. It follows that Allegation 1 dealt only with the fact of diagnosis of Bipolar and did not encompass the possible allegation of misconduct in attending a home visit whilst drunk.
63. Allegation 2 relied on the findings of the DBS as to both the home visit on 15 March 2017 and the neglect of the Registrant’s own children. Unsurprisingly, the panel found that proved on the basis of the document from the DBS confirming that fact. However, although the DBS made findings on those issues, the First Respondent’s panel did not.



It did not do so because it did not have to. The allegation was not of misconduct but of impairment as a result of the barring order.

64. I accept Mr Hopkin's submission that the Registrant's attendance at a home visit on 15 March 2017 while under the influence of alcohol, and her neglect of her own children, was a matter that *could* amount to misconduct. The Registrant's health problems may have had some relevance, but there was no basis on the evidence for concluding that these incidents were not misconduct because they were entirely attributable to her health condition. In those circumstances, the first Respondent should either have amended the charges to include an allegation that the Registrant's fitness to practise is impaired by reason of misconduct, or, at the very least, the panel should have adjourned the hearing and given directions that SWE consider whether the charges should be amended to include such an allegation.
65. It is no answer to those criticisms to say that the adjudicators fully considered the relevant factual circumstances concerning the Registrant's fitness to practise in regard to both her health condition and the barring decision taken by the DBS. That was not sufficient because they were not considering the allegations of misconduct that ought to have been made.
66. In my judgment, the failure to draft the allegations correctly, to bring the real burden or substance of what had gone wrong with the registrant's practise to the attention of the panel, amounted to "undercharging". On the evidence, and applying its own rules, the Regulator should have included, or at least have considered including, allegations of misconduct. This was a serious procedural irregularity. On that ground alone, the decision of the panel cannot stand.

#### *Ground 1*

67. I turn next to consider whether, leaving aside the inadequacies of the drafting of the charges, the First Respondent was wrong to conclude that a suspension order was a sufficiently serious sanction to protect the public.
68. I have very considerable sympathy with Mr Hopkins's argument in substance. If all the matters that should have been before the panel had been before the panel, and *if* the panel had found misconduct in the Registrant's home visit on 15 March 2017 and the neglect of her own children, there would be a powerful case to the effect that anything less than removal from the register would have been insufficient. That would be a matter, however, for the panel and not, at least in the first instance, for this court.
69. If, there had been no error in the drafting of the charges and the panel were only imposing a sanction necessary given a mental health diagnosis and reflecting the mere fact of the barring order, then in my view it could not be said that the sanction was outside the range of appropriate sanctions. In those circumstances, I would not accept Mr Hopkins's submission that public confidence in the social work profession would be diminished simply by the difference between the sanction imposed by the First Respondent and the terms of the barring order; those two bodies serve different functions. The risk to public confidence flowed from the charging decisions.
70. But I would not, in those circumstances, accept Ms Iyengar's submissions that it is in the public interest for the Regulator to show "*empathy and compassion*" towards social

workers, or that vulnerable registrants should necessarily be treated with compassion by the Regulator. It is well established in the case law and on the face of the statute that the fundamental functions of the regulator are to protect the public and maintain the reputation of the profession, and that those necessities are more important than the fortunes of any individual member. However, there is a public interest in rehabilitating social workers with chronic ill-health or disability, so that they are not lost to the workforce and can serve the public in future. Accordingly, were it the case that there was no potential misconduct here and that the Registrant's actions were simply the result of mental ill-health, then the sanction imposed might well be safe from challenge.

### Conclusions

71. The failure to charge misconduct, or at least to consider charging misconduct, was a serious procedural irregularity, the effect of which is that I am unable to determine whether the sanction was sufficient for the protection of the public or not. That being so, this appeal succeeds on ground 2, but not on ground 1.
72. I will hear counsel on the appropriate remedy, but I am presently minded to quash the decision of 22 September 2022 and remit the matter to the First Respondent with a direction that it give close consideration to reformulating the allegations so as to include allegations of misconduct as to the Second Respondent's attendance at the home visit on 15 March 2017 and as to the neglect of her own children. The matter should then be heard by a differently constituted panel.
73. It seems to me that the First Respondent should also consider whether there are grounds for charging misconduct in the Registrant's failure to co-operate with the fitness to practise process by not agreeing to undergo a further examination by a psychiatrist.