



Neutral Citation Number: [2022] EWHC 2484 (KB)

Case No: CO/2872/2022

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 5 October 2022

**Before :**

**MR DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

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**Between:**

**THE NURSING AND MIDWIFERY COUNCIL**

**- and -**

**MM**

**Applicant**

**Respondent**

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**Mr Robert Benzynie** (in house counsel at the NMC) for the **Applicant**  
**Mr Isaac Joory** by way of written representations for the **Respondent**

Hearing date: 16 August 2022  
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**JUDGMENT**

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10.30am on 5 October 2022.*

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

1. This is an application by the Nursing and Midwifery Council (“**the NMC**”) under article 31 of the Nursing and Midwifery Order 2001 (“**the Order**”) for an order extending the period of suspension of the Respondent, (“**MM**”) from the register of nurses held by the NMC for a period of 8 months until a final hearing can be convened to determine regulatory charges against MM. The NMC was represented by Mr Robert Benzynie, who had prepared a helpful skeleton argument. The Respondent was not present for the hearing which was conducted over CVP. He is represented by the Royal College of Nursing who put in a detailed letter of representations from an RCN Solicitor, Mr Isaac Joory.

### **The First Referral.**

2. MM is a registered nurse who qualified in paediatric nursing in March 2002 and in mental health nursing in February 2006. The Respondent was employed by a London NHS Foundation Trust (“**the Trust**”) from April 2012 until he was suspended on 4 March 2020 at and was later dismissed for reasons that are explained below. In March 2020 the Trust referred a concern to the NMC arising out of an incident in October 2014 when MM received a caution from the police for “slapping” his stepdaughter. This was, as I note below, not the first time that the Trust had become aware that the Respondent had received this caution.
3. Following on from the caution, the police appear to have referred MM’s case to the Disclosure and Barring Service (“**DBS**”). It is not clear what process was followed by the DBS but in early 2015 the DBS took the decision to bar MM from working with children and vulnerable adults. The DBS sent letters to MM informing him of that decision on 21 January 2015 and 22 April 2015. It is unclear whether the DBS also sent letters to the Trust. However, if they did so, no action appears to have been taken by the Trust. It has subsequently transpired that the DBS letters sent to the Respondent were returned by the Royal Mail, marked to the effect that MM was not living at the address to which the letters were sent. I do not know whether this was factually correct or not but there is nothing in the evidence to contradict MM’s evidence that he was unaware of this decision by the DBS until he was informed about the suspension on 4 March 2020, namely the date when he

was suspended. His solicitors are now engaged with the DBS and are seeking to appeal against this decision but, as far as I can determine, the DBS ban on the Respondent working with children and vulnerable adults remains in place at this point.

4. In 2015, MM was convicted of driving with excess alcohol and was banned. In 2018, MM was arrested in respect of two serious sexual offences. He was subsequently charged with those offences and a trial occurred in November 2020. MM was acquitted of both offences. There is no information about the nature of the alleged offences and whether MM's defence to this case was, for example, mistaken identity or consent. There is also no information about where these alleged offences took place and whether they had any connection to the Respondent's work. At this stage I can only assume that nothing has been proved in connection with these matters which could affect his responsibilities as a nurse, although I accept that these may be matters to be investigated by the NMC in the future.
5. In 2017 MM was aware that his DBS clearance certificate to work with children was, as he thought, due to be renewed. As part of this process, the evidence suggests that he informed the Trust about the 2015 caution and told his employers that that it would appear on his new DBS certificate. When the new certificate arrived, neither MM nor his employers appear to have recognised that it included a requirement that prevented MM working with children and vulnerable adults. MM said that he did not appreciate that this was what the certificate provided, and it appears that his employer was equally unaware of this requirement.
6. In November 2019, MM applied to be promoted to the role of Clinical Team Lead at the Trust. As part of his job application, he disclosed the fact that he had received the caution in 2015, but stated that this was a "spent conviction". The existence of the caution had, of course, already been disclosed to his employers some 2 years earlier. There is no indication in the evidence that MM had been involved in any incidents at work during this period which led to any concerns about his conduct as a nurse or in relation to his treatment of patients or colleagues.
7. MM's application for promotion appears to have led the Trust to properly examine his DBS certificate and led them to understand for the first time that MM was subject to a

restriction which prevented him working with children and vulnerable adults. MM states that, when this was drawn to his attention by the Trust, this was the first that he knew about the DBS bar. It is entirely understandable that, once this discovered, MM was referred to the NMC by the Trust because they were then aware of the fact that MM was working in breach of a DBS requirement.

8. That disclosure is referred to as “Referral 1” in the NMC’s case. On 26 October 2021 the NMC Case Examiners considered a report on MM’s case in relation to his having worked whilst subject to a DBS bar and the fact that he had been charged with sexual offences. By this date he had been acquitted of the rape offences. The NMC decided in a letter dated 6 December 2021 that there was no case for MM to answer for these matters and that his case would be closed. The letter stated

*“The evidence suggests you did not receive the letters sent to you by the DBS, and the information contained on the certificate, which you admit you had sight of, was not identified by the Trust either. We consider this is supportive of the fact that this information may have been easy to miss”*

9. The decision of the Case Examiners was that there was “no realistic prospect of dishonesty being proven” arising out of the fact that MM was working when he was on the DBS children and adults barring list. The witness statement of Conor Bell states that the NMC completed their investigation and finalised their report into these matters in August 2021 and that the NMC Case Examiners made a decision that the Respondent had no case to answer on 26 October 2021. There is no explanation as to why there was a delay until 6 December 2021 before a letter was prepared to inform the Respondent that the investigation against him had closed. It seems to me that it is unacceptable practice for a professional regulator to prepare a report suggesting that a person who is under investigation has no case to answer and for there then to be significant delays before a decision is made and further delays before that decision is communicated to the registrant.
10. The decision that MM had no case to answer in respect of Referral 1 was reported to senior staff within the NMC. On 23 December 2021, some time after MM was told that he had no case to answer, I am told that the NMC decided to review that decision because a Senior Case Examiner considered that the decision may have been materially flawed. The power

to review the decision is under Rule 7A of the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004. Rule 7A(3) provides:

*“(3) Where the Registrar decides to carry out such a review, the Registrar must—*

*(a) notify the registrant, the maker of the allegation (if any) and any other person who, in the opinion of the Registrar has an interest in it, of that decision;*

*(b) notify the registrant, the maker of the allegation (if any) and any other person who, in the opinion of the Registrar, has an interest in the no case to answer decision of any new information and where appropriate, provide them with that information; and*

*(c) seek representations from those persons.*

*(4) The notification referred to in sub-paragraphs (a) and (b) of paragraph (3) must be in writing and, in the case of the notification referred to in sub-paragraph (a), must give reasons for the Registrar’s decision”*

11. The RCN, on behalf of the Respondent, have complained that the first that the Respondent learned that a decision had been taken to review the decision that he had no case to answer in respect of Referral 1 was on 3 August 2022. If that is correct, it suggests that the NMC carried out the review in breach of its obligations to inform the registrant and to seek his views as part of the review process. There is nothing in the evidence to suggest that the NMC had complied with its legal obligations under Rule 7A(3) to notify the Respondent that the Registrar was undertaking a review, to give reasons for that decision or to seek representations about the proposed review from those acting for MM.
12. Mr Bell’s witness statement explains that that review was due to be completed by May 2022 but had been delayed and that a decision rested with the Assistant Registrar. I was informed that a decision had been made by the Registrar shortly before this hearing in August 2022 to overturn the December 2021 decision. That means that the NMC’s regulatory processes against MM in respect of the matters included in Referral 1 would be

likely continue now that the decision that he had no case to answer was overturned. However, I have not been provided with a copy of that decision and was not asked to rely upon that the purpose of this application. It was unclear from the evidence whether the NMC was relying on the outcome of this review for the purposes of the present application, but I was told in submissions that the NMC was not doing so and accordingly for the purposes of today I proceed on the basis that there are no live regulatory matters against the Respondent arising out of the first referral.

### **The Second Referral**

13. Whilst investigating matters relating to the First Referral, a second investigation was opened arising out of the failure by MM to declare relevant matters to the NMC when the Respondent applied to renew his registration as a nurse in 2017 and 2020. The relevant matters which were being investigated were (a) the police caution for slapping his stepdaughter in 2014, (b) his driving conviction in 2015 and (c) the fact that the Respondent was subject to rape allegations dating from an incident in 2018 and which led to him being charged in November 2019 (which is the date when he informed his employer that he was subject to the rape charges). The NMC's concerns are that MM may have acted in breach of his professional obligations because the first two of these matters should have been disclosed when MM applied for NMC revalidation in 2017, and the outstanding rape allegations should have been disclosed when he applied for NMC revalidation in 2020. Disciplinary charges have been brought against MM arising out of his failure to make these disclosures.
  
14. Accordingly, at this stage, the only relevant regulatory matters which are currently the subject of disciplinary action arise out of the failure by MM to draw the attention of the NMC to the caution in 2014, his driving conviction in 2015 and the unresolved rape allegations against him in 2020. For these purposes, the fact that MM was subsequently acquitted of the rape allegations is not strictly relevant. The NMC's case is that his duties as a professional nurse included an obligation to disclose to the NMC the fact that he was the subject of these serious criminal charges so that his professional regulator could take a view as to whether the circumstances of those matters gave rise to regulatory concerns. MM accepts that he did not inform the NMC about these matters but asserts that he was not acting dishonestly in failing to do so and that he had kept his employers properly informed. Those matters will come before a hearing which is anticipated to be held in

December 2022. However, it is possible that this hearing will be delayed if the NMC decide to reopen the matters relating to Referral 1 and to hear all of the allegations concerning the Respondent at a single hearing.

### **Interim Orders.**

15. Article 31(2) of the 2001 Order provides:

*“(2) Subject to paragraph (4), if the Committee is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of the person concerned, for the registration of that person to be suspended or to be made subject to conditions, it may—*

*(a) make an order directing the Registrar to suspend the person’s registration (an “interim suspension order”), or*

*(b) make an order imposing conditions with which the person must comply (an “interim conditions of practice order”),*

*during such period not exceeding eighteen months as may be specified in the order”*

16. Accordingly, the Committee needs to be satisfied that interim order is “*necessary*” for either (a) the protection of members of the public or (b) is otherwise in the public interest before it has a discretionary power to impose an order by either suspending a nurse from practice or imposing conditions on that nurse’s practice. The general approach required to be taken by both the Investigating Committee and the Court in determining whether it is lawful and appropriate to impose interim orders on a medical professional was considered by the Court of Appeal in *General Medical Council v Hiew* [2007] 1 WLR 2007. This case explains that both the Committee and, where an extension is sought by the regulator from the Court, the Court act as primary decision-makers. It also confirmed that the onus of satisfying the Committee or the Court that the statutory criteria are met and that it is appropriate to impose an order lies on the Regulator.

17. The court said at §33:

*“The court is not expressing any view on the merits of the case against the medical practitioner. In those circumstances, the function of the court is to ascertain whether the allegations made against the medical practitioner, rather than their truth or*

*falsity, justify the prolongation of the suspension. In general, it need not look beyond the allegations”*

18. On 21 April 2020 MM’s case came before the NMC Investigating Committee. That committee imposed an interim suspension order for a period of 18 months. On 14 October 2021 the interim order was extended by consent by the High Court for a period of 10 months, expiring on 18 August 2022. I note in passing that, at the point that the RCN consented on MM’s behalf to the extension of the interim suspension order. That decision was made shortly before the Case Examiners decide that there was no case to answer in respect of the allegations under Referral 1. The RCN and MM were not informed of this decision until 6 December 2021.
19. All interim order decisions are reviewed regularly by the Investigating Committee. The most recent review took place on 28 July 2022, and confirmed by a letter of 29 July 2022. At this stage the only regulatory charges being proceeded with against MM involved those in respect of Referral 2. However, in opening the case in support of the continuance of the interim order, the NMC representative set out and appeared to rely upon the matters related to Referral 1. It seems to me that this was inappropriate because, at that stage, a decision had been made (and communicated to the Respondent) that there was no case to answer. I note that there was no reference in the exchanges before the Committee to the fact that the NMC was in the process of reviewing the decision that there was no case to answer in respect of Referral 1, and thus the Committee appear to have been unaware of that review process. That appears to support the Respondent’s case that he was unaware of that review process until August 2022.
20. The key passage of the letter explaining the reasons of the Committee was as follows:

*“On basis of the information before it the panel were satisfied that there remains a risk of repetition and a real risk of harm to the public if you were to practise without restriction. The panel accepted that some very serious allegations against you have been dismissed. However, the panel noted the serious nature of the allegations which remain. They involve allegations of dishonesty and lack of integrity on two separate NMC revalidations. Accordingly, the panel concluded that the allegations if proven are serious and could potentially cause harm to patients under your care. The panel*



*also noted that you still remain on the barring list. Having heard the allegations involved you failing to be open and honest with your employer at the time, and with the NMC, the panel considered that there remains a risk of repetition. The panel determined that an interim order is also otherwise in the public interest to maintain public confidence in the professions and to declare and uphold proper standards of conduct”*

21. I fully accept that failing to disclose relevant information to the NMC when required to do so as part of a revalidation process is a potentially serious matter. However, none of these allegations were directly related to the discharge of the Respondent’s duties at work and none involved his interactions with members of the public as a nurse.
22. In submissions by Counsel for the NMC, it was suggested that the “risk to patients” identified by the committee arose out of the risk of violence being used by MM in the same way as he had assaulted his stepdaughter. I do not accept that submission for two reasons. First, this appears to have been a single incident which occurred 8 years ago in a domestic setting. There is no evidence of any repetition of this conduct by the Respondent and no evidence that it was replicated in a work context. It was not serious enough for the police to charge MM with a criminal offence but was dealt with by way of a caution. I thus struggle to see how that incident can form a proper basis for a present risk to patients.
23. Secondly, and in any event, the facts surrounding the original assault are not a matter of present regulatory focus by the NMC. If the concerns referred to in this paragraph are solely around the failure to make appropriate disclosure within a revalidation form, it is difficult to see why those allegations, of themselves, are said to give rise to a risk to patients. There is no evidence that MM has acted dishonestly in a work context or in relation to patients, and I find it difficult to see how the logical jump can be made to saying that omitting information which ought to have been included in a revalidation form can provide a solid evidential basis for saying that this is conduct which could lead to a risk to patients. It is, of course, possible to say that any form of conduct which amounts to potential dishonesty could be replicated in another context within the work environment and that a nurse who acts dishonestly is a risk to patients. However, it seems to me that there has to be a measure of proportionality applied to that exercise in order to balance the real nature of the risks, the detriment to patients from being deprived of the services of an

otherwise competent nurse (particularly at a time of intense shortages of nurses in the NHS) and the very real detriment to the individual nurse who is subject to suspension.

24. The second ground relied upon by the Committee is that a suspension is necessary to maintain confidence in the profession. In *Houshian v General Medical Council* [2012] EWHC 3458, Mr Justice King said that “*it is likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest*”. The test under Article 31(2) of the Order is whether an interim suspension is “*necessary*”. It seems to me that, in reaching a conclusion that a suspension was a proportionate response to the risk posed by the Respondents by his remaining in unrestricted practice pending the resolution of the allegations against him, if the Committee were seeking to rely on the public interest as a basis for justifying the suspension, it is important for the Committee to identify precisely why it is said to be in the public interest to deprive the Respondent of the ability to exercise his profession whilst charges against him remain to proven. The Committee failed to explain why it had reached the conclusion that this was one of those rare cases where the Respondent’s suspension was necessary in the public interest. In those circumstances, whilst I give weight to the decision of the Committee as an expert body, that weight must be reduced by its failure to provide proper reasons.
25. The Court is a primary decision maker and I thus have to decide whether the continued suspension of the Respondent meets the tests under article 31(2). Whilst each case is intensely sensitive to the individual facts, the necessity condition must be satisfied in any case which an interim order is to be imposed. “Necessary” does not, in my judgment, mean absolutely essential but must mean substantially more than preferable or desirable. Accordingly, in order to show that an interim order is necessary to protect members of the public or is justifiable in the public interest it is essential that the evidence led by the GMC demonstrates a clear causal link between the risks to the public and the conduct of the Registrant or clearly shows why a suspension is necessary in the public interest. In this case there does not appear to be anything beyond the allegations themselves to support the case for a suspension. The case against this Registrant would be far stronger if there was any evidence that his alleged dishonest behaviour was replicated within a work context or that his conduct in his professional role was inappropriate towards patients. There is no

such evidence and I am not satisfied that the failure to include important matters on his revalidation forms demonstrates that it is necessary that he should remain suspended.

26. I am therefore not satisfied that the NMC has discharged the burden of showing that the Respondent's continuing suspension is necessary for either of the grounds set out in article 31(2) and this application falls to be dismissed. It may well be that the Respondent may find it difficult to secure work as a nurse because of the continuing DBS bar on him but that, of itself, cannot justify the continuance of a total suspension from practice.
27. During the hearing counsel for the NMC suggested that, if I was not minded to support MM's continuing suspension, I had the power to impose conditions on the Respondent's registration as an alternative to a full suspension and should exercise that power. I fully accept that the Committee has power to impose conditions under article 31(2)(b) and that, if conditions are sought to be extended beyond the period of 18 months referred to in that article, the court has power to seek an extension of an order imposing conditions under article 31(8). Article 31(9) originally provided that:

*“On such an application the court may extend (or further extend) for up to 12 months the period for which the order has effect”*

28. It seems to me that this provision gave the Court a binary power, namely a power to extend any order that the Committee makes or to decline to do so. However, article 31 was amended by the Nursing and Midwifery (Amendment) Order 2014 (S.I. 2014/3272) and now reads:

*“(12) Where an order has effect under paragraph (2), (7) or (9), the court may, on an application being made by the person concerned—*

*(a) in the case of an interim suspension order—*

*(i) terminate the suspension,*

*(ii) replace the interim suspension order with an interim conditions of practice order;*

*(b) in the case of an interim conditions of practice order—*

*(i) revoke or vary any condition imposed by the order,*

*(ii) replace the interim conditions of practice order with an interim*

*suspension order;*

*(c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made (or in the order extending it),*

*and the decision of the court under any application under this paragraph shall be final”*

29. I thus accept that I have power to substitute conditions on the Respondent’s registration as an alternative to lifting the suspension. However, before doing so, it seems to me that the NMC should provide details of the conditions that they propose as an alternative to suspension and that the RCN should have the opportunity to make submissions on any proposed conditions. I do not consider that the court has the power to devise conditions or should impose them without notice having been given to the Respondent. That has not happened in this case and thus I decline the NMC’s invitation to impose conditions as an alternative to suspension. I am, in any event, mindful of the fact that MM will not be able to work as a nurse until he has secured the agreement of the DBS to lift the present restriction on him. However, if they clear MM to be able to resume working as a nurse, I cannot see that the extant regulatory matters justify imposing restrictions on his ability to work. I thus do not consider that conditions are appropriate in this case.
  
30. The Respondent’s suspension is thus not extended and, subject to any further interim order being made by the NMC, he will be able to resume practice as a nurse if the DBS restriction is lifted.

