

## ***Members present***

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Kisha Punchihewa, Head of Legal, Professional Standards Authority  
Rebecca Senior, Senior Legal Reviewer, Professional Standards Authority

## ***In attendance***

Michael Standing, Counsel, 39 Essex Chambers, Legal Advisor

## ***Observers***

Briony Alcraft, Scrutiny Team Co-ordinator, Professional Standards Authority  
Kate Fawcett, Senior Scrutiny Officer, Professional Standards Authority

## **1. Definitions**

- 1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

## **2. Purpose of this note**

- 2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's Panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act. The meeting was held virtually.

## **3. The Authority's powers of referral under Section 29 of the Act**

- 3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.
- 3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:
- to protect the health, safety and well-being of the public
  - to maintain public confidence in the profession concerned, and
  - to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*<sup>1</sup>).

#### **4. Conflicts of interest**

4.1 The Members did not have any conflicts of interest.

#### **5. Jurisdiction**

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 10 May 2021.

#### **6. The relevant decision**

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

#### **7. Documents before the meeting**

7.1 The following documents were available to the Members:

- Determination of the Panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing dated [REDACTED]
- Counsel's Note dated 4 May 2021
- Regulator's Bundle of exhibits
- Case Examiner's Bundle
- The NMC Code
- The NMC's Guidance on Considering Sanctions for Serious Cases and the Guidance on Seriousness
- The Authority's Section 29 Case Meeting Manual

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

7.2 The Members and the Legal Advisor were provided with a copy of a response from the NMC to the Authority's Notification of s.29 Meeting.

## 8. Background

8.1 At the relevant time the Registrant was working as an advanced nurse practitioner for a Hospital Trust.

8.2 The Registrant was arrested on suspicion of possession of indecent images of children and possession of extreme pornography, for which he was interviewed under caution in [REDACTED], and was suspended by the Trust pending the outcome of the Police investigation.

8.3 The Registrant was arrested following a visit to his stepdaughter's house after he had consumed three quarters of a bottle of vodka. In interview with the Police, the Registrant accepted that he entered his stepdaughter's home with the intention of 'running the Hoover round' as had been requested whilst she and his wife were on holiday. He entered his stepdaughter's bedroom and sought out costumes or items of clothing of a sexual nature, including a black garment akin to a maid's outfit. He explained in interview that he took a picture of his flaccid penis within the 'maid' item and placed both back in the drawers before leaving the property.

8.4 During a search of his phone, his wife discovered the images. She contacted her brother-in-law who recovered other sexual images from the Registrant's laptop. The Registrant's wife then reported the Registrant to the Police.

8.5 An allegation of burglary was initially considered but not pursued. During the first Police interview the Registrant denied searching for sexual images of children or animals. However, during the second Police interview which was requested by the Registrant, he volunteered that the Police would find such images on electronic devices that had been seized. The Registrant explained that he believed he suffered from a pornography addiction and subsequently provided evidence to the NMC that he had visited his GP in relation to the issue.

8.6 In [REDACTED] the Crown Prosecution Service (CPS) made a decision not to prosecute the case on the basis that there were continuity (chain of evidence/custody) issues because the Registrant's devices had been given to his wife's brother-in-law before the Police. This raised questions about the origin of any material later recovered.

8.7 The charges before the NMC, which were admitted, alleged that the Registrant downloaded or otherwise obtained and/or viewed images of animals and children which were of a sexual nature.

8.8 The allegations were found proven by admission and, the Panel found the Registrant's actions amounted misconduct. The Panel nonetheless concluded that the Registrant's fitness to practise is not impaired on either personal or public interest grounds, and consequently no sanction was imposed.

## 9. Applying Section 29 of the 2002 Act

9.1 The Members considered all the documents before them and received legal advice.

9.2 The Members discussed the following concerns about the decision:

### *Under-prosecution*

9.3 The Members first touched on the matter of whether the NMC should have included additional allegations in relation to the Registrant's conduct in photographing his genitals in his step-daughter's house amongst her clothing. The Members noted that the burglary charge against the Registrant did not proceed given he had permission to enter the property, and that his step-daughter is an adult, and therefore no criminal offence was committed. The Members therefore concluded that this was not a matter to be addressed by professional regulation and therefore there was no failure on the NMC's part not to include such allegations.

9.4 The Members next discussed whether the NMC ought to have alleged dishonesty or lack of candour in relation to the Registrant's initial denials during the first Police interview in not admitting the contents of his electronic devices but later making admissions in the second interview. The Members considered there was a line of inquiry that ought to have been followed by the NMC in terms of making contact with the Registrant's family members to ask what they had seen on the Registrant's phone. They also considered the NMC could have attempted to obtain further information from the Police regarding the evidence of other family members obtained during the Police investigation.

9.5 However, the Members concluded that the NMC were potentially hampered by the approach taken by the Police and the CPS, and similarly the Authority was not in a position to assess whether or not that potential evidence would have been of value to the NMC's case. They therefore could not conclude that there had been under-prosecution in relation to dishonest conduct.

### *Was the finding of current impairment wrong or lacking in reasons?*

9.6 The Members discussed whether the Panel was wrong not to find the Registrant's fitness to practise impaired on public interest grounds, having found the Registrant's actions fell seriously short of the professional conduct and standards expected of a nurse and amounted to misconduct.

9.7 They discussed the seriousness of the admitted facts, and considered that the fact that the Registrant had not been charged or convicted with any criminal offence was irrelevant to the seriousness of the admitted acts. They noted however that it was not entirely clear specifically what the Registrant had admitted to, i.e. viewing images inadvertently, or downloading them. Regardless, the Members considered that viewing any material that involves the exploitation of women or children is extremely serious and noted that there was no recognition by the Panel of the factors which make viewing and downloading indecent images of children or animals particularly serious misconduct, nor was there any reference to the harm caused to the victims involved in the creation and distribution of such images. Given the NMC's own guidance on seriousness

identifies this kind of behaviour as serious, the Members were surprised at this omission by the Panel, and the failure to consider where on the spectrum of seriousness such conduct sits. Further, the Members noted that the determination does not reference any consideration given to how the public might perceive such conduct, or how it seriously undermines the trust in the Registrant and the nursing profession.

- 9.8 In addition, the Members noted that this was a Registrant who had a long-standing, self-confessed history of both legal and illegal use of extreme pornography, which he had tried to address unsuccessfully in the past. The Panel had relied solely on his written submissions in reaching the decision that he had remediated and showed insight when there was no objective evidence to back up his claims. The Members were not convinced by the Registrant's submission that he has replaced viewing of extreme pornography with "*exercise, meditation, yoga, meditation and the love of [his] wife*", and noted with interest that the NMC's submission on the Registrant's response was for the Panel to "consider these comments with some caution, although it is a matter for the Panel to consider whether it believes [redacted] account or not". The Members noted here that a significant degree of deference will be due to a Panel's assessment of a Registrant who attends a hearing to give evidence. However, the Registrant did not attend this hearing, and therefore less deference was due.
- 9.9 The Members noted that there was an absence of consideration of the case law that flows from *Yeong*, which held that (in summary) in cases where the panel is considering misconduct that undermines public confidence, the efforts made by the practitioner to address his behaviour for the future *may carry very much less weight* than in a case where the misconduct consists of clinical errors. . The Members noted that the Legal Assessor does not appear to have advised the Panel on the relevant case law and that consequently the framework within which the Panel was making its decision on impairment was not complete. The Members considered this led the Panel to make a flawed decision on the Registrant's level of insight.
- 9.10 The Members next discussed the level of reasons provided by the Panel for its finding. They considered the level of the Panel's explanation to be limited and brief and that it provided a marked absence of reasoning for why or how the Registrant's insight, remediation and remorse meant that it was "not appropriate" for the Panel to make a finding of impairment on public interest grounds. The Members considered that, given the factual basis for a finding of misconduct, in reaching a finding of no impairment, a Panel is obliged to provide more reasons rather than less, and that this was particularly important in a case involving such serious allegations.
- 9.11 Further, the Members were confused by the Panel's statement that "public confidence in the profession would not be undermined by a finding of no current impairment given the specific circumstances of this case". There was no explanation as to whether these specific circumstances related to the lack of criminal prosecution or the fact there was no evidence, or any alternative reason. The Members could see no particular argument for this being an exceptional case other than in relation to the absence of information about the nature/number of the images involved. However, having found misconduct, this

became largely irrelevant and made the Panel's decision on impairment hard to fathom.

- 9.12 In the Members' view, there was no other appropriate conclusion the Panel could have reached other than to make a finding of impairment of fitness to practise on public interest grounds.

### **Conclusion on insufficiency for public protection**

- 9.13 The Members concluded that the Panel's decision to find the Registrant's fitness to practise not impaired was insufficient for public protection in the following respects.
- 9.14 There were flaws in the Panel's assessment of seriousness, its approach to impairment, and the framework on which it made its decision, together with and lack of reasons for not finding impairment on public interest grounds. In the Members' view, the seriousness of the case warranted a finding of impairment of fitness to practise and the Panel was not entitled to reach the view it did that this was an exceptional case. The finding of the Panel equates to a complete acquittal which sends entirely the wrong message to the public and undermines professional standards and public confidence in the nursing profession.

## **10. Referral to court**

- 10.1 Having concluded that the Panel's Determination was insufficient for public protection, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.
- 10.2 In considering the exercise of the Authority's discretion, the Members received legal advice as to the prospects of success and took into account the need to use the Authority's resources proportionately and in the public interest.
- 10.3 Taking into account those considerations, along with advice on the prospects of success, the Members agreed that the Authority should exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.



**Alan Clamp (Chair)**

**26/5/21**

**Dated**

**11. Annex A – Definitions**

11.1 In this note the following definitions and abbreviations will apply:

<b>The Authority</b>	The Professional Standards Authority for Health and Social Care
<b>The Panel</b>	A Fitness to Practise Panel of the NMC
<b>The Registrant</b>	[REDACTED]
<b>The Regulator</b>	The Nursing and Midwifery Council
<b>Regulator’s abbreviation</b>	NMC
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Members</b>	The Authority as constituted for this Section 29 case meeting
<b>The Determination</b>	The Determination of the Panel sitting on [REDACTED]
<b>The Court</b>	The High Court of Justice of England and Wales