

Section 29 Case Meeting

10 February 2023

157-197 Buckingham Palace Road, London SW1W 9SP



Katerina Mareckova

Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Marks Stobbs, Director of Scrutiny and Quality, Professional Standards Authority
Christine Braithwaite, Director of Standards and Policy, Professional Standards Authority

In attendance

Peter Mant of 39 Essex Chambers

Observers

Rebecca Senior-Carroll, Lawyer, Professional Standards Authority
Michael Humphries, Scrutiny Manager, Professional Standards Authority
Joella Hazel, EDI Manager, Professional Standards Authority
Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority

This meeting took place virtually via Teams

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.

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*¹).

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 14 February 2023.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on 21 December 2022.

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 21 December 2022
- The Authority's Detailed Case Review
- Transcripts of the hearing
- Counsel's Note dated 8 February 2023
- The NMC's Code - in force at the time of the incident
- The NMC's Indicative Sanctions Guidance – in force at the time of sanction stage
- The Authority's Section 29 Case Meeting Manual
- Letters from the NMC dated 17 January 2023 and 7 February 2023

¹ 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. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

8. Background

- 8.1 The Registrant was employed as a Band 6 Mental Health Nurse with Chiltern Crisis Home Treatment Team.
- 8.2 On 21 December 2020 the Registrant pleaded guilty to racially aggravated intentional harassment at Buckinghamshire Magistrates Court. The Registrant was fined £850 and was ordered to pay £100 compensation and £85 towards court costs.
- 8.3 The incident which led to the conviction took place on 28 December 2019 in High Wycombe. The Registrant was drunk having spent the day drinking with friends. At approximately 3.30am whilst in line for a kebab, the Registrant was witnessed using seriously racist and abusive language in relation to a number of people including an individual who remonstrated with her. The incident lasted about 15 minutes.
- 8.4 The Panel found the allegation proved by way of the conviction certificate. The Panel did not find the Registrant impaired on either public protection or public confidence grounds. Regarding the former, the Panel was satisfied that the Registrant had demonstrated sufficient insight and remorse such that the risk of repetition was low.

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:

Was the Panel wrong to find that the Registrant's conduct did not reflect a "deep-seated attitudinal problem" and/or that the risk of repetition was remote?

- 9.3 The Members were concerned that the Registrant might have an attitudinal problem. They noted that she had been questioned on a number of occasions by the Panel as to why she had acted in the way she had and that she was unable to provide an answer. While she had undertaken two training courses to try to demonstrate that she had remediated, the Members were not clear that they were sufficient. They were not satisfied that the Panel had properly grappled with the seriousness of her conduct or that she had provided sufficient evidence for them to conclude that the risk of repetition was low.
- 9.4 The Members questioned whether the public could have confidence in a nurse who had been convicted of such conduct, especially in the light of an absence of clear evidence to suggest she understood why she had acted in this way.

- 9.5 The Members referred to the NMC's guidance and noted that a "fundamental understanding" by the Registrant was required to demonstrate insight and were not satisfied that the Registrant had provided this, or that the Panel had given persuasive reasons as to how the Registrant had demonstrated such.
- 9.6 The Members were mindful that in cases where a Registrant is present and gives live evidence, that deference should be afforded to a Panel's assessment. However, they were not satisfied that the Registrant did not demonstrate an attitudinal problem and that the risk of repetition was low.

Did the Panel fail to have regard to relevant guidance and/or depart from it without good reason?

- 9.7 The Members were unclear as to what extent the Panel had fully considered the NMC's guidance on "How we determine seriousness".
- 9.8 The Members noted that such a conviction would usually suggest a finding of impairment unless there were exceptional circumstance. The specific part of the guidance states: *"To be satisfied that conduct of this nature has been addressed, we'd expect to see comprehensive insight, remorse and strengthened practice from an early stage, which addresses the specific concerns that have been raised. In addition, we must be satisfied that discriminatory views and behaviours have been addressed and are not still present so that we and members of the public can be confident that there is no risk of repetition...."*
- 9.9 The Members were concerned that the Panel had failed to note the conviction as an aggravating factor and that any insight would have held less weight given the seriousness of the conviction and the public interest concerns.
- 9.10 The Members noted that a conviction is a finding by a criminal court and the public would expect a regulator to take some action to mark it to provide sufficient reasons as to why this was not necessary.

Did the Panel fail to recognise and/or address the significance of the conviction to public confidence in the profession?

- 9.11 The Members were concerned that the Panel's decision failed to analyse the impact of the conviction of public confidence in any detail. Whilst they noted the Panel did acknowledge the seriousness of the underlying conduct, which it described as *"abhorrent"*, *"deplorable"* and *"particularly grave"*, the Members were concerned that the decision failed to address any concerns about the risk that minority ethnic groups might feel reluctant to access health and care service from such an individual if the regulator is not seen to take action in cases of this nature. This was particularly important in the context of health inequalities.

Was the advice given by the Legal Assessor correct?

- 9.12 The Members questioned the advice given by the Legal Assessor, noting that they had stated that *"Impairment should be judged by the suitability of this particular Registrant to remain on the register without restriction"*. The Members were concerned that such advice was incorrect, noting that a finding of

impairment may be required to maintain public confidence without any restrictions on a Registrant's practice.

- 9.13 Secondly, and more generally, the Legal Assessor emphasised the significance of insight to the decision on impairment without any mention of the authorities which indicate that personal mitigation may be of less weight in cases involving fundamental breaches of professional standards, as the Members believed was present here.
- 9.14 Lastly, in his list of questions for the Panel, the Legal Assessor mentioned the public interest only once, saying: "Is it in the public interest on all the evidence to make a finding of current impairment or has this Registrant fundamentally moved on?". The Members questioned whether this was correct, noting that the Panel had to consider whether public confidence in the profession would be undermined if a finding of impairment was not made, even if the Registrant had "fundamentally moved on".

In justifying the decision that a finding of impairment was not required on public interest grounds, did the Panel place inappropriate and/or excessive reliance on: i. the fact of the conviction; ii the regulatory process; and iii. personal mitigation.

- 9.15 The Members were concerned that the Panel failed to address the significance of the conviction on public confidence and that their statement that public confidence was satisfied by the conviction was a separate point. The Members agreed that the Panel did not grapple with this and that it had placed excessive reliance on the conviction itself as a means of recording the unacceptability of the conduct, rather than looking at its impact on confidence in the profession.
- 9.16 The Members agreed that whilst there was some relevant mitigation, it appeared that the Panel had given excessive weight to that, compared with other concerns.

Conclusion on insufficiency for public protection

- 9.17 The Members concluded that the panel's decision to find that the Registrant's Fitness to Practise was not impaired was insufficient for public confidence in the profession and failed to satisfy the public interest, for the reasons set out above.

10. Referral to court

- 10.1 Having concluded that the panel's Determination was insufficient on public interest and public confidence grounds, 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.

A handwritten signature in black ink that reads "Alan Clamp". The signature is written in a cursive style with a small dash at the end.

Alan Clamp (Chair)

01/03/23

Dated

11. Annex A – Definitions

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

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Fitness to Practise Committee of the NMC
The Registrant	Katerina Mareckova
The Regulator	Nursing and Midwifery Council
Regulator's abbreviation	NMC
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on 21 December 2023
The Court	The High Court of Justice of England and Wales
The Code	Regulator's Code of Practise
The ISG]	Regulator's Indicative Sanctions Guidance