

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Order Review Hearing
Wednesday, 28 February 2024**

Virtual Hearing

Name of Registrant: Nubia Torres Victoria

NMC PIN 15A0085C

Part(s) of the register: Registered Nurse – Sub Part 1
Adult Nursing – (6 January 2015)

Relevant Location: Norfolk

Type of case: Misconduct and Lack of knowledge of English

Panel members: Elliott Kenton (Chair, Lay member)
Lisa Punter (Registrant member)
David Newsham (Lay member)

Legal Assessor: Peter Jennings

Hearings Coordinator: Nicola Nicolaou

Nursing and Midwifery Council: Represented by Suren Agarwala, Case Presenter

Mrs Victoria: Not present and not represented at the hearing

Order being reviewed: Conditions of practice order (6 months)

Fitness to practise: Impaired

Outcome: **Striking-Off order to come into effect at the end of 5 April 2024 in accordance with Article 30 (1)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mrs Victoria was not in attendance and that the Notice of Hearing had been sent to Mrs Victoria's registered email address by secure email on 17 January 2024.

Mr Agarwala, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, date and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Mrs Victoria's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

In light of all of the information available, the panel was satisfied that Mrs Victoria has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mrs Victoria

The panel next considered whether it should proceed in the absence of Mrs Victoria. The panel had regard to Rule 21 and heard the submissions of Mr Agarwala who invited the panel to continue in the absence of Mrs Victoria.

Mr Agarwala referred the panel to the email from Mrs Victoria dated 13 February 2024 which stated:

'...Thank you for letting me know about the date of the hearing... I will not assist to this hearing...'

The panel accepted the advice of the legal assessor.

The panel decided to proceed in the absence of Mrs Victoria. In reaching this decision, the panel considered the submissions of Mr Agarwala, the email from Mrs Victoria dated 13 February 2024, and the advice of the legal assessor. It had particular regard to the relevant case law and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mrs Victoria;
- Mrs Victoria has informed the NMC that she has received the Notice of Hearing and confirmed she will not be attending today's hearing;
- There is no reason to suppose that adjourning would secure her attendance at some future date; and
- There is a strong public interest in the review of the case in accordance with the statutory requirements.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Mrs Victoria.

Decision and reasons on review of the substantive order

The panel decided to make a striking-off order to take effect on the expiry of the current conditions of practice order. This order will come into effect at the end of 5 April 2024 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the seventh review of a substantive conditions of practice order originally imposed for a period of 18 months by a Fitness to Practise Committee panel on 1 September 2017. The order was reviewed on 28 February 2019 and the conditions of practice order was varied and extended for 12 months. The conditions of practice order was reviewed on 13 March 2020 and extended for 12 months. A third review took place on 24 February 2021 when the panel extended the conditions of practice order for 12 months. The order was reviewed on 25 February 2022 when the panel extended the order for 12 months. A fifth review took place on 8 March 2023 when the panel extended the conditions of practice order for a further six months. The interim conditions of practice order was last reviewed on 24 August 2023 when the panel extended the order for a further six months.

The current order is due to expire at the end of 5 April 2024.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the substantive order were as follows:

'That you, a registered nurse:

- 1) *Do not have the necessary knowledge of the English language to practise safely and effectively;*
- 2) *On 18 August 2015 your actions were inappropriate in that you;*
 - a. *Failed to follow instructions to not administer medication;*
 - b. *Failed to carry out patient identification checks before administering medication;*
 - c. *Incorrectly administered to Patient A:*
 - i. *Metformin 500mg;*
 - ii. *Frusemide 20 mgs;*
 - iii. *Ramipril 2.5 mgs;*

AND, in light of the above, your fitness to practise is impaired by reason of your lack of knowledge of English and/or misconduct.'

The sixth reviewing panel determined the following with regard to impairment:

'The panel noted that there was no factual or material change in circumstances or compelling new evidence before it.

While it was of the view that it was commendable that you had undertaken work in Spain in an English-speaking setting, over the last 3 months, the panel did not think this would be significantly more immersive than the 8 years you have spent in UK work environments, as far as communicating in English is concerned.

The panel had sight of your most recent OET results taken on 6 August 2022, and noted that you had made some improvements in relation to Reading and Speaking, achieving 340 and 330 respectively out of a 350-pass mark. In your October 2021 assessment, you achieved the requisite pass mark of 350 in the Writing component.

The panel noted that although you had made arrangements to return to the UK to work as a care assistant, and possibly practise as a nurse later, you had made no clear plans for preparing for, or booking a test.

The panel noted that the current conditions of practice order requires that you to satisfy condition 1 as a pre-condition to comply with condition 2, however, it was of the view that you have not yet had the opportunity to strengthen your practice in relation to your misconduct due to your inability to satisfy the NMC's language test requirement.

In light of this, this panel determined that you are still liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that your fitness to practise remains impaired.'

The sixth reviewing panel determined the following with regard to sanction:

'The panel next considered whether imposing a further conditions of practice order on your registration would still be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel was satisfied that the existing conditions of practice order remained sufficient to address the failings highlighted in this case. The panel accepted that you have been complying with current substantive conditions of practice and are engaging with the NMC.

The panel was of the view that a further short extension of the conditions of practice order is sufficient to protect patients and the wider public interest, noting as the original panel did that there was no evidence of deep-seated attitudinal problems and that the misconduct related to poor judgement rather than clinical competence. In this case, the conditions already in force would protect patients during the period they are in force.

The panel decided that given that your English test results are close to the required pass mark and the personal difficulties you encountered during the review period, there were grounds for a further short extension of the conditions of practice order. It therefore determined that a suspension order or a striking-off order would be disproportionate at this stage. It was of the view that you would benefit from a focused approach to prepare for any subsequent OET assessment.

The panel seriously considered a striking off order. On balance however, it also took into consideration your [PRIVATE] which may have impacted on your ability to take a test more recently. The panel was of the view that to impose a suspension order or a striking-off order would be disproportionate and would not be a reasonable response in the circumstances of your case at this stage.

Accordingly, the panel determined, pursuant to Article 30(1)(c) to extend the conditions of practice order for a further period of 6 months, which will come into effect on the expiry of the current order, namely at the end of 5 October 2023. It decided to impose the following conditions which it considered are appropriate and proportionate in this case:

'For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate

role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.

1. *Before you return to practise as a registered nurse you must successfully undertake and pass an OET or IELTS English language test by achieving the scores/grades set out in the NMC's 'Accepted English language test' guidance and send a copy of your results to the NMC within 7 days of you receiving them.*
2. *Once you have satisfied condition 1 above and returned to practice as a registered nurse, you must not carry out any element of medicines administration unless supervised by a registered nurse until such time as you have successfully passed a formal, practical assessment in the administration of medication, as required by your employer. You must send a copy of this assessment to the NMC within 7 days of completing it.*
3. *You must tell the NMC within 7 days of any nursing appointment (whether paid or unpaid) you accept within the UK or elsewhere and provide the NMC with contact details of your employer.*
4. *You must tell the NMC about any professional investigation started against you and/or any professional disciplinary proceedings taken against you within 7 days of you receiving notice of them.*
5.
 - a) *You must within 7 days of accepting any post of employment requiring registration with the NMC, or any course of study connected with nursing or midwifery, provide the NMC with the name/contact details of the individual or organisation offering the post, employment or course of study.*
 - b) *You must within 7 days of entering into any arrangements required by these conditions of practise provide the NMC with the*

name and contact details of the individual/organisation with whom you have entered into the arrangement.

6. *You must immediately tell the following parties that you are subject to a conditions of practice order under the NMC's fitness to practise procedures and disclose the conditions listed at (1) to (5) above to them:*
- a. *Any organisation or person employing, contracting with or using you to undertake nursing work.*
 - b. *Any agency you are registered with or apply to be registered with (at the time of application) to provide nursing services.*
 - c. *Any prospective employer (at the time of application) where you are applying for any nursing appointment.*
 - d. *Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take a course (at the time of application).'*

Decision and reasons on current impairment

The panel considered carefully whether Mrs Victoria's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel carried out a comprehensive review of the order in light of the current circumstances. Whilst it noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel had regard to all of the documentation before it, including the NMC bundle, and the email from Mrs Victoria dated 13 February 2024. It has taken account of the submissions made by Mr Agarwala on behalf of the NMC. He provided a summary of the case and invited the panel to extend the conditions of practice order for a further six months. He further invited the panel to consider that this order cannot continue to be renewed, as it has been ongoing for a number of years, and that it is in the interest of all parties that the proceedings come to an end.

Mr Agarwala submitted that Mrs Victoria's fitness to practise remains impaired, as she still has not satisfied the English language requirements and has not worked as a registered nurse since the imposition of the order in 2017. He submitted that Mrs Victoria indicated in her email dated 13 February 2024 that she has given up (on the OET/IELTS test), as she said she was frustrated and disappointed. He submitted that Mrs Victoria has indicated that she wishes to remain in practice as a registered nurse, and that she considers that her communication skills are sufficient to practise efficiently and effectively.

Mr Agarwala submitted that the panel may deem that the next step for Mrs Victoria is to take advice and consider other ways to establish English language competence. He referred the panel to the NMC June 2023 Guidance on English Language Requirements which sets out that it is possible for a registrant to establish language competence in another way, short of taking one of the two recognised tests.

Mr Agarwala submitted that there has been a change in circumstances since the last review hearing. He submitted that Mrs Victoria has returned to Spain to try and establish her nursing practice there.

When asked by the panel why the NMC is seeking to continue with a conditions of practice order, and not impose a suspension or striking-off order, Mr Agarwala submitted that extensive support has been provided to Mrs Victoria over the years, but that she has not been able to meet the language requirements. Mr Agarwala submitted that it is the general approach of the NMC to retain registrants with expertise on the register.

The panel also had regard to Mrs Victoria's written representations in her email to the NMC dated 13 February 2024 which stated:

'...Unfortunately I have not passed the OET exam the last time I sat it in Madrid. I feel really frustrated and dissatisfied [sic]. I feel tired and exhausted at that point it is affecting [PRIVATE]. I just have to thank the NMC panel for your patience and support all these years. I request the panel a plea or exception considering [sic] have bien [sic] living in UK for 9 years, working in care elderly people and

demencia [sic] patients. I have no problem communicating in [sic] English and my writing is better than I speak. I can not pass this exam...'

The panel heard and accepted the advice of the legal assessor.

The panel had regard to the NMC June 2023 Guidance on English language requirements and the Guidance on Not having the necessary knowledge of English FTP-2e, together with other applicable guidance.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel noted that the initial panel, and subsequent panels, found impairment based on Mrs Victoria's lack of knowledge of the English language, and misconduct, and restricted her practice as a result. The panel noted that there was no factual or material change in circumstances or compelling new evidence before it since the previous hearing. The panel noted that, except for the assertion in her email, Mrs Victoria has not provided evidence that she is now competent in English language or that she has passed the OET/IELTS English language test.

The panel noted that Mrs Victoria acknowledged that she has not passed the examination and indicated that the NMC should allow her to practise despite not meeting the requirement of the English language test. The panel noted that her assertion, unsupported by any actual evidence, that she has no problem with the English language, indicates a lack of insight. The panel determined that Mrs Victoria has had many opportunities to pass the English language test and develop her English language skills but has been unable to do so and it does not know when Mrs Victoria last attempted to take the English language test. In the panel's view, not having the required level of English language would be likely to impact patient safety. Further, having not returned to practice as a registered nurse, Mrs Victoria has not demonstrated any strengthening of her practice in relation to the medication errors proved at the initial hearing.

In light of this, the panel determined that Mrs Victoria is still liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and also the wider public interest, which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Mrs Victoria's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mrs Victoria's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no action. The panel bore in mind that the NMC's initial position was that they would propose to the panel to allow the order to lapse (without making any further order) following a finding of impairment. This would have the effect that because the substantive order was the only reason that Mrs Victoria was currently on the register, she would be removed from the register. However, Mr Agarwala indicated that the NMC had modified its position in that allowing an order to lapse is not appropriate in Mrs Victoria's circumstances but is appropriate when a registrant is looking to leave the register voluntarily, for example because they are intending to retire. The panel had regard to NMC Guidance REV-3h '*Allowing nurses, midwives and nursing associates to be removed from the register when there is a substantive order in place*'.

The panel concluded that taking no further action would not be appropriate in this case, both because of the seriousness of the case, and also because Mrs Victoria has indicated that she would like to continue working as a registered nurse. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mrs Victoria's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mrs Victoria's lack of knowledge of English language was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether a further period of conditions of practice on Mrs Victoria's registration would still be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel noted that this case has been ongoing for a number of years, and that Mrs Victoria has made small steps towards improving her English during this time. However, the panel does not have any further evidence from Mrs Victoria in relation to her current position in terms of satisfying the English language requirements so as to practise safely and efficiently as a nurse. The most recent information in her email of 13 February 2024 is that she is of the view that she cannot pass the English language test.

It was clear to the panel that conditions would not be workable, given that Mrs Victoria could not satisfy the requirement to pass an English language test despite multiple attempts. However, the panel was mindful that having an adequate knowledge of English was required to protect the public and maintain public confidence in the profession. In considering conditions of practice, the panel had carefully considered NMC guidance SAN-3c (Conditions of Practice Order). One of the factors relevant to imposing a conditions of practice order is if there is potential and willingness to respond positively to retraining. The panel considered that neither were satisfied. Mrs Victoria has had multiple attempts at passing the English language test, which have been unsuccessful and in her latest correspondence, she indicated that she could not pass this test. She has not indicated any intention to undergo any other further training. Therefore, the panel determined that there is no reasonable prospect that she would either pass an approved test or meet alternative English language requirements.

The panel next considered imposing a suspension order. The panel noted that Mrs Victoria intends to return to nursing, but that it has been a number of years since Mrs Victoria last practised as a nurse and she has not provided up to date evidence of steps taken to develop her English language skills or pass the English language test. The panel determined that there is no realistic prospect of Mrs Victoria being able to meet the English language requirements necessary for safe and effective practice as a registered nurse in this country. The panel was accordingly of the view that it is not in Mrs Victoria's interest, or the interest of the public, to continue with repeated reviews of this case. In the panel's judgement, the nursing profession is at risk of being undermined by keeping the case ongoing.

In these circumstances, the panel determined that a period of suspension would not serve any useful purpose.

The panel next considered a striking-off order. It approached this question with great care. The panel noted that this matter has been ongoing since 2017 and during the course of reviews, previous panels have commented that this case warranted serious consideration of striking-off. The panel noted that the reason why striking-off was not elected was because there had been some, though minor, positive developments from Mrs Victoria, together with some personal mitigation, which persuaded a panel to extend the order.

The panel considered the NMC guidance in relation to striking off, SAN-3e (Striking-Off Order). The panel considered that, while the misconduct which formed part of the original NMC referral – the medication errors - was serious, it would in principle have been capable of remediation. However, Mrs Victoria has not been able to strengthen her practice in relation to medication because her ongoing failure to achieve a sufficient standard of English has meant that she has not returned to practice as a registered nurse in this country.

However, as the panel has already stated, Mrs Victoria has not been able to pass the English language test set out in her conditions for a number of years and has not presented any other evidence of an adequate knowledge of the English language for her to be able to practise safely. The panel concluded that at this point and in light of the

evidence received from Mrs Victoria that she cannot pass the test, public confidence in the profession can only be maintained by Mrs Victoria being removed from the register. The panel determined that a striking-off order was the only sanction which was sufficient to protect patients and the public and to satisfy the public interest by maintaining confidence in the profession and upholding professional standards of conduct and performance. In reaching this conclusion, the panel recognised that Mrs Victoria has now had multiple attempts at passing one of the English language tests over a period of years, and reviews of her case cannot be continued indefinitely, nor would the public expect them to be.

In making this decision, the panel took into account the impact its decision will have on Mrs Victoria. It is satisfied that this is outweighed by the need to protect the public and meet the public interest and that a striking-off order is proportionate.

The panel therefore directs the registrar to strike Mrs Victoria's name off the register.

The panel noted that it is up to Mrs Victoria to apply for restoration, should she wish, at a future date, to resume practising as a registered nurse.

This striking-off order will take effect upon the expiry of the current conditions of practice order, namely the end of 5 April 2024 in accordance with Article 30(1).

This decision will be confirmed to Mrs Victoria in writing.

That concludes this determination.