

Nursing and Midwifery Council
Fitness to Practise Committee
Substantive Hearing
30-31 May 2019

Nursing and Midwifery Council, 2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of registrant:	Mr Mallikarjun G Shabadi
NMC PIN:	03A0926O
Part(s) of the register:	Registered Nurse – Sub part 1 – Adult Nursing (24 January 2003)
Area of Registered Address:	England
Type of Case:	Conviction
Panel Members:	Jacqueline Alexander (Chair, Lay member) Christine Wint (Registrant member) Geoffrey Baines (Lay member)
Legal Assessor:	Fiona Barnett
Panel Secretary:	Sam Headley
Mr Shabadi:	Not present and not represented
Nursing and Midwifery Council:	Represented by Leeann Mohamed, Case Presenter
Facts proved by admission:	1.1, 1.2
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim Order:	Interim suspension order (18 months)

Decision on Service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Shabadi was not in attendance and that written notice of this hearing had been sent to Mr Shabadi's registered address by recorded delivery and by first class post on 29 April 2019. Notice of this hearing was delivered to Mr Shabadi's registered address on 30 April 2019.

The panel took into account that the notice letter provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Mr Shabadi's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Miss Mohamed submitted the NMC 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.

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

Decision on proceeding in the absence of Mr Shabadi

The panel next considered whether it should proceed in the absence of Mr Shabadi.

The panel had regard to Rule 21 (2) which states:

- “(2) Where the registrant fails to attend and is not represented at the hearing, the Committee—
- (a) shall require the presenter to adduce evidence that all reasonable efforts have been made, in accordance with these Rules, to serve the notice of hearing on the registrant;
 - (b) may, where the Committee is satisfied that the notice of hearing has been duly served, direct that the allegation should be heard and determined notwithstanding the absence of the registrant; or
 - (c) may adjourn the hearing and issue directions.”

Miss Mohamed invited the panel to continue in the absence of Mr Shabadi on the basis that he had voluntarily absented himself and stated via email communication on 15 May 2019 that he was content for the hearing to proceed in his absence.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 was not absolute and was one that should be exercised “with the utmost care and caution” as referred to in the case of *R v Jones (Anthony William)*, (No.2) [2002] UKHL 5. The panel further noted the case of *General Medical Council v Adeogba*; *General Medical Council v Visvardis* [2016] EWCA Civ 162.

The panel noted the email correspondence from Mr Shabadi on 15 May 2019 in which he stated: “Just to let you know and confirm that I will not attend the hearing on the 30th and I am happy for the hearing to continue in my absence.”

The panel was mindful that Mr Shabadi had previously indicated that he was unable to attend on the hearing dates and might seek a postponement. He had not carried out any further steps in this regard and the NMC had not pursued that issue. By request of the panel, the NMC attempted to contact Mr Shabadi on the day of the hearing to clarify whether Mr Shabadi had intended to request a postponement, as stated previously in his correspondence with the NMC. The NMC was unable to contact Mr Shabadi or leave a voicemail for him.

The panel decided to proceed in the absence of Mr Shabadi. In reaching its decision, the panel considered the submissions of the case presenter and the advice of the legal assessor. Having considered his email of the 15 May 2019, the panel was satisfied that Mr Shabadi was aware of the hearing and voluntarily waived his right to attend, and that he was not seeking a postponement as he had indicated previously. It had particular regard to the factors set out in the decision of *Jones*. It also had regard to the overall interests of justice and fairness to all parties. It noted that there was a strong public interest in the expeditious disposal of the case.

There would be some disadvantage to Mr Shabadi if the panel proceeded in his absence, but the panel noted that Mr Shabadi had submitted a reflective piece.

The panel decided that there was no good reason to adjourn and that it is fair, appropriate and proportionate to proceed in the absence of Mr Shabadi. The panel would draw no adverse inference from Mr Shabadi’s absence.

Details of charge:

That you, a registered nurse:

1. On 13 June 2018 at Great Yarmouth Magistrates Court were convicted as follows:

1.1 Between 11/05/2018 and 14/05/2018 at Great Yarmouth in the County of Norfolk pursued a course of conduct which amounted to the harassment of person A and which you knew or ought to have known amounted to the harassment in that you pestered person A with excessive and unwanted contact by telephone, text message and personal attendance at her home and sent her a pornographic image. Contrary to section 2(1) and (2) of the Protection from Harassment Act 1997.

1.2 On 13/05/2018 at Great Yarmouth in the County of Norfolk sent to person A by means of a public electronic communications network a message that was grossly offensive or of an indecent, obscene or menacing character. Contrary to section 127(1)(a) and (3) of the Communications Act 2003.

AND in light of the above, your fitness to practise is impaired by reason of your conviction.

Background

Mr Shabadi referred himself to the NMC following a conviction at Great Yarmouth Magistrates' Court on 13 June 2018. Mr Shabadi pursued a course of conduct that amounted to harassment, in the form of calling person A around 40 times within two days, making threats and sending her an indecent image and coming to the person A's house. In the police interview, Mr Shabadi stated that he wanted [PRIVATE] and that was the reason he called so many times and came to person A's house.

Mr Shabadi was convicted of harassment without violence and sending a pornographic image to person A, claiming it to be her. Mr Shabadi was made subject to a restraining order until 12 June 2020, ordered to pay fines of £400, compensation of £250 to the victim, costs of £85 and the victim surcharge of £35. He resigned from his position as a Staff Nurse at Barchester and Oulton Park Care Centre and made a self-referral to the NMC on 17 May 2018.

Decision on the findings on facts and reasons

Rule 31 (2) of the Rules states:

- “(2) Where a registrant has been convicted of a criminal offence—
- (a) a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom (or, in Scotland, an extract conviction) shall be conclusive proof of the conviction; and
 - (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.”

In reaching its decisions on the facts, the panel considered all the evidence adduced in Mr Shabadi’s case, together with the submissions made by Miss Mohamed, on behalf of the NMC.

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

The panel was aware that the burden of proof rested on the NMC, who had produced a certification of conviction.

The panel drew no adverse inference from the non-attendance of Mr Shabadi.

The panel considered each charge and made the following findings:

Charge 1.1:

1. On 13 June 2018 at Great Yarmouth Magistrates Court were convicted as follows:

- 1.1 Between 11/05/2018 and 14/05/2018 at Great Yarmouth in the County of Norfolk pursued a course of conduct which amounted to the harassment of person A and which you knew or ought to have known amounted to the harassment in that you pestered person A with excessive and unwanted contact by telephone, text message and personal attendance at her home and sent her a pornographic image. Contrary to section 2(1) and (2) of the Protection from Harassment Act 1997.

This charge was found PROVED by way of Mr Shabadi's conviction.

In reaching this decision, the panel took into account the memorandum of conviction provided and Mr Shabadi's admission to this charge in the response to the notice of hearing.

Charge 1.2:

1. On 13 June 2018 at Great Yarmouth Magistrates Court were convicted as follows:
 - 1.2 On 13/05/2018 at Great Yarmouth in the County of Norfolk sent to person A by means of a public electronic communications network a message that was grossly offensive or of an indecent, obscene or menacing character. Contrary to section 127(1) (a) and (3) of the Communications Act 2003.

This charge was found PROVED by way of Mr Shabadi's conviction.

In reaching this decision, the panel took into account the memorandum of conviction provided and Mr Shabadi's admission to this charge in the response to the notice of hearing.

Submissions and decision on impairment

The panel next went on to decide if as a result of this conviction Mr Shabadi's fitness to practise is currently impaired.

Miss Mohamed submitted that it was for the panel's professional judgement in determining whether it found Mr Shabadi's fitness to practice was currently impaired. However, she referred the panel to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin), and "The Code: Professional Standards of practice and behaviour for nurses, midwives and nursing associates (2015)". Miss Mohamed submitted that, in this case, the following sections of the Code were engaged:

- 20.1 keep to and uphold the standards and values set out in the Code
- 20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people
- 20.4 keep to the laws of the country in which you are practising.

Miss Mohamed submitted that nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. In this regard, Miss Mohamed referred the panel to the judgement of Mrs Justice Cox in the case of *Grant* in which Mrs Justice Cox said in paragraph 74:

"In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold

proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.”

Mrs Justice Cox went on to say in Paragraph 76:

“I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor’s fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

Do our findings of fact in respect of the doctor’s misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
- b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or
- c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
- d. ...”

Miss Mohamed submitted that in Mr Shabadi's case, paragraphs b. and c. of the above test were engaged. She submitted that the conduct in relation to the charge is a serious departure from the accepted standards and proper behavior expected of a registered nurse.

Miss Mohamed submitted that Mr Shabadi's reflective piece sought to minimise the impact of his conduct. She also drew the panel's attention to Mr Shabadi's previous convictions over a period of five years and his NMC caution, which was in force at the time of the conviction in June 2018.

Miss Mohamed further submitted that should a finding of current impairment on the ground of public interest not be made, then the public's confidence in both the profession and the regulator would be undermined.

The panel found that Mr Shabadi had breached the specific sections of the Code referred to by Miss Mohamed in her submissions. In addition, the panel found that he had breached:

- 20.2 ... treating people fairly and without ... bullying and harassment

Regarding insight, the panel considered that the reflective piece provided by Mr Shabadi was over a year old and did not demonstrate any recent insight into his behaviour. It also found that the piece contained the lowest standard of reflection and demonstrated no evidence of self-analysis. Further, it found that the reflective piece sought to minimise his conduct by blaming others and was in the main a factual recount of the events. The panel noted that Mr Shabadi had said:

"I sent an image which was offensive but it was not intentional I just wanted to know the truth that's all..." and "Mistakes happen form [sic] time to time".

The panel determined that Mr Shabadi had had plenty of time to provide further detailed reflective evidence to the NMC and that the current piece provided insufficient insight into his conduct and impact on others, thus there is a continued risk and therefore a likelihood of reoccurrence. In the panel's view, Mr Shabadi had breached fundamental tenets of the profession, brought the profession into disrepute, and was liable to do so in the future.

The panel bore in mind that the overarching objectives of the NMC were to protect, promote and maintain the health, safety and wellbeing of the public and patients, and to uphold the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

In considering whether Mr Shabadi has in the past and or was liable in the future to put patients at risk of harm, the panel bore in mind that the conviction was unrelated to his clinical practice and that it had received no information to suggest that his clinical practice was a matter of concern. It therefore decided that there were no public protection concerns in Mr Shabadi's case.

The panel determined that, in Mr Shabadi's case, a finding of impairment on wider public interest grounds was required. This was based on two reasons; the public who, if fully informed of the facts of this case, would find it deplorable if there was to be no finding of impairment; and that Mr Shabadi's behaviour brought the reputation of the profession into disrepute. A reasonable and fully informed member of the public would expect a finding of impairment to follow such a conviction. Further, the panel determined that a finding of Mr Shabadi's fitness to practise not to be currently impaired would undermine the profession, as well as the NMC as an effective regulator of professional standards.

Having regard to all of the above, the panel was satisfied that Mr Shabadi's fitness to practise is currently impaired.

Determination on sanction:

The panel considered Mr Shabadi's case very carefully and decided to make a striking-off order. It directed the registrar to strike Mr Shabadi's name from the NMC register.

In reaching its decision, the panel had regard to all the evidence that had been adduced in Mr Shabadi's case. The panel bore in mind that any sanction imposed had to be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the Sanctions Guidance (SG) published by the NMC. It recognised that the decision on sanction is a matter for the panel, exercising its own independent judgement.

Miss Mohamed invited the panel to make a strike-off order. She referred the panel to the Sanctions Guidance in order to assist its decision in determining an appropriate sanction. She outlined the aggravating and mitigating factors.

The panel accepted the advice of the legal assessor.

The panel determined the aggravating factors in Mr Shabadi's case to be:

- Mr Shabadi has a previous fitness to practise history
- Mr Shabadi's case involved a second criminal conviction of a similar nature, the first of which had resulted in NMC fitness to practise proceedings. Those proceedings had resulted in a substantive suspension order which was later replaced with a conditions of practice order and further replaced by a caution order
- The offences which gave rise to the current convictions occurred when Mr Shabadi was the subject of the NMC caution order referred to above.
- Mr Shabadi's harassment conviction touched on sexual misconduct

- Mr Shabadi had demonstrated insufficient insight into his conduct and its impact on the victim and on the reputation of the profession
- Mr Shabadi's reflective piece sought to minimise his conduct and attempted to blame others

The panel determined the mitigating factors in Mr Shabadi's case to be:

- Mr Shabadi made a self-referral to the NMC
- Mr Shabadi had engaged in the fitness to practise process
- There were no concerns raised about Mr Shabadi's clinical practice

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of Mr Shabadi's case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where '...the case is at the lower end of the spectrum of impaired fitness to practise...' The panel considered that Mr Shabadi's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. It noted that Mr Shabadi was already subject to an NMC caution order which had failed to deter him from reoffending. Thus, the panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Shabadi's registration would be a sufficient and appropriate response. The panel was mindful that any conditions imposed must be proportionate, measurable and workable. The panel was of the view that there were no practical or workable conditions that could be formulated, given that the convictions in Mr Shabadi's case did not involve his clinical practice. Furthermore, the panel concluded that imposing conditions on Mr Shabadi's

registration would not adequately address the seriousness of this case and would not protect the wider public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction.

Mr Shabadi's conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel was mindful that the 2018 conviction was a repetition of behaviour, as Mr Shabadi had been convicted in 2012 of offences against the same victim. The NMC SG indicated that suspension is appropriate for a single instance of misconduct which was not the situation here.

The panel looked again at Mr Shabadi's reflective piece and noted that he attempted to minimise the events and blame others. The panel was of the view that this combined with the repetitious nature of the conviction indicated a deep seated attitudinal problem. In coming to this view, the panel also noted Mr Shabadi's police interview in which:

“He was then asked about the 45 phone calls that he had made to the victim in a short space of time, he admitted making the calls, but could not see that this was harassment [PRIVATE]”

The panel noted that Mr Shabadi had been suspended in 2016 and that this suspension order had been changed to a conditions of practice order and then caution order by reviewing panels. He was subject to the NMC caution order at the time of the offence. Mr Shabadi appeared to have little insight and had now demonstrated a history of ignoring an NMC sanction, so the panel was of the view that there was a significant risk of repetition. The panel noted that Mr Shabadi was subject to a court imposed restraining order indicating that the court felt that there was a need to protect the victim from further future events.

The panel considered the mitigating factors but could see nothing to influence its view that a suspension order would not be appropriate.

Balancing all of the factors, the panel determined that a suspension order would not be an appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following from the SG:

- Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?
- Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?
- Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?

Mr Shabadi was convicted of the most recent criminal offence whilst he was the subject of an NMC caution order. The panel bore in mind that his early criminal convictions and sentence have not deterred him from offending again against the same victim. The NMC caution order had similarly not deterred him. He had persisted in minimising his conduct both when interviewed by the police and when writing his reflective account for the NMC. The panel accepted that there was some mitigation, but this was in the panel's view, very limited and did not relate directly to his offending. Other than the reflective piece provided to the NMC over a year ago, Mr Shabadi had taken no steps to provide evidence to the panel that he had addressed his offending behaviour, is sorry for it, and will not repeat it. The panel also bore in mind that the restraining order made against Mr Shabadi will continue until 12 June 2020.

There were a significant number of serious aggravating factors which satisfied the panel that Mr Shabadi's convictions and his behaviour, when looked at in the context of his

criminal and regulatory history, were fundamentally incompatible with continued registration as a nurse. Having balanced the aggravating and mitigating factors, the panel was satisfied that a striking-off order was the only appropriate and proportionate order which would serve to maintain public confidence in the profession and ensure proper standards of conduct were upheld.

Determination on Interim Order

The panel considered submissions made by Miss Mohamed that an interim order should be made on the grounds that it is in the wider public interest. This was because the striking-off order would not take force for 28 days and would mean that Mr Shabadi would be able to practise without restriction if no interim order was imposed.

The panel accepted the advice of the legal assessor.

The panel was satisfied that whilst there was no public protection issues, an interim suspension order should be imposed in the wider public interest. It found that public confidence would be seriously undermined if it did not impose an interim suspension order given its findings on impairment. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order. To do otherwise would be incompatible with its earlier findings and would not uphold public confidence in the profession.

The period of the interim suspension order is for 18 months to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim order will be replaced by the striking-off order 28 days after Mr Shabadi is sent the decision of this hearing in writing.

That concludes this determination.