Nursing and Midwifery Council

Fitness to Practise Committee

Substantive Hearing

Friday, 3 May 2019

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Thursday, 22 August 2019

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Friday, 27 September 2019

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

Name of registrant:	Steven Roger McKerral
NMC PIN:	99A1049O
Part(s) of the register:	Registered Nurse – Sub-part 1 RN1 – Adult Nursing – 12 January 1999
Area of Registered Address:	England
Type of Case:	Conviction
Panel Members:	Andrew Galliford–Yates (Chair, Registrant member) Helen Chrystal (Registrant member) Geoffrey Baines (Lay member)
Legal Assessor:	Simon Walsh
Panel Secretary:	Philip Austin
Registrant:	Present and represented by Thomas Buxton, instructed by the Royal College of Nursing on Day 1. Not present and not represented in absence on Day 2.
Nursing and Midwifery Council:	Represented by Ruth Alabaster, Case Presenter
Facts proved:	All charges
Facts not proved:	None

Fitness to practise:	Currently impaired
Sanction:	Striking-off order
Interim Order:	Interim suspension order – 18 months

Application to exclude MG5 report

As a preliminary issue before the start of the substantive hearing, Mr Buxton, on your behalf, made an application in relation to Rule 31(2)(b) of The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ("the Rules") for the panel not to admit the MG5 report completed by the police in relation to your criminal trial into evidence. He submitted that the NMC are attempting to put the MG5 report before the panel in order to prove the background of this case. He submitted that the details in this report are not 'findings of facts' upon which your convictions are based.

Mr Buxton submitted that an MG5 report is used when a defendant offers a guilty plea in a criminal court. He submitted that you contested the allegations in Willesden Magistrates Court and you were convicted of two offences. Mr Buxton submitted that you did not have the opportunity to test the information contained in the MG5 report and it did not form part of the findings made by the court in reaching its decision. He informed the panel that the transcript from Willesden Magistrates' Court is not available.

Ms Buxton said that you appealed both of your convictions in the Crown Court but these convictions were upheld. However, he informed the panel that you successfully appealed your sentence, which resulted in you having to pay a financial penalty, compensation, court costs and a victim surcharge.

Mr Buxton submitted that the memorandum of conviction in this case is sufficient for the panel to consider whether the charges are found proved. He submitted that it would not be fair for the panel to receive the MG5 report in its current form as it deals with matters extraneous to the charge which are unfair, have never been litigated, and are not relevant to your convictions.

Mr Buxton submitted that the issues for the panel to consider are the facts of the conviction, together with any other evidence you may give in relation to insight. He submitted that the facts outlined in the charges are not disputed.

Mr Buxton made a secondary submission that, should the panel not be in agreement to exclude the MG5 report in its entirety, parts of the MG5 report should be redacted before it is provided to the panel. He submitted that in its current form however, the MG5 report is not and can never stand as evidence of findings of fact upon which a conviction is based. Mr Buxton submitted that the MG5 report does not assist the panel with what it is considering today in any event.

Ms Alabaster, on behalf of the NMC invited the panel to have regard to Rule 31(1) and Rule 31(2)(b) in considering this application. This Rule states that:

> *"31.—*
> *(1) Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place).*
>
> *(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."*

Ms Alabaster submitted that the Rules can be given a wide-ambit to encapsulate this document being admitted into evidence.

Ms Alabaster asked that the panel do not exclude a document in its entirety that it has not yet seen. She submitted that the panel can admit the MG5 report as evidence of the facts stated in it. Ms Alabaster invited the panel to consider what prejudice there is to you in admitting the MG5 report into evidence.

Ms Alabaster submitted that it is a matter of principle that an MG5 report is capable of proving the facts stated in it pursuant to Rule 31(2)(b).

The panel heard and accepted the advice of the legal assessor which was that an MG5 report was not proof of the facts stated in it pursuant to Rule 31(2)(b).

The panel considered an MG5 report to be a view put forward by a police officer who dealt with an incident and documented their summary of it. It did not consider an MG5 report to be a document that could be relied upon as a finding of fact at the criminal trial in the context of Rule 31(2)(b).

Ms Alabaster then invited the panel to consider the admissibility of the MG5 report as hearsay evidence. She submitted that the MG5 report falls within the wide-ambit of Rule 31(1) of the Rules, in that it should be admitted into evidence.

Ms Alabaster submitted that the MG5 report contains relevant background information which the panel need to be aware of. She submitted that not all of the information contained within the MG5 report is disputed, and these elements should at least be able to form part of the NMC's case. She further submitted that if the panel were not minded to admit the entirety of the MG5 report into evidence, it may be possible for the parties to come to an agreement as to what is allowed to go before the panel.

Ms Alabaster submitted that there is no discernible prejudice to you in admitting this document into evidence. She submitted that the MG5 report is not the sole and decisive evidence that the NMC intends to rely on and that it would be fair to admit it.

Mr Buxton reiterated his submission that the MG5 report did not form any part of the findings of facts upon which your convictions are based. He submitted that some of the matters contained within it are neither relevant, fair, or in connection with the convictions.

Mr Buxton submitted that the evidence contained within the MG5 is the sole and decisive evidence which is contested by you.

Mr Buxton referred the panel to the case of *Thorneycroft v NMC [2014] EWHC 1565 (Admin)* and *El Karout v NMC [2019] EWHC 28 (Admin)*. He submitted that there is an unfairness in admitting evidence of any kind subject to extraneous dispute, particularly in circumstances where you have never been able to challenge it at any point. He submitted that if the panel were to see the disputed content of the MG5 report, its judgment may be affected in proceeding with this case.

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

The panel noted that the NMC was proposing to rely on the MG5 report as proof of background facts, as it had no other evidence of the circumstances in relation to charge 2. It also noted that the facts contained within the MG5 report are vigorously disputed by you. It acknowledged Mr Buxton's submission that you were not able to contest the information contained in the MG5 report at any stage.

The panel noted that it has not yet had sight of the MG5 report, and that it was being asked to adjudicate on the fairness and the relevance of the document prior to taking account of its content. It noted that any decision it may make in respect of admitting this document into evidence may have serious consequences for you at the impairment and/or sanction stage of this hearing.

In these particular circumstances, the panel was of the view that it was fair to both parties for it to view the MG5 report, insofar as it has currently been redacted, in order

to rule on its importance and to make a decision as to whether or not to admit it into evidence. The panel determined that after receiving the MG5 report in its current form, it would then be in a position to hear submissions from the parties as to the fairness and relevance of this document, and make a decision on whether to exclude this document in its entirety, admit it in its current form, or admit it subject to further redactions.

After having sight of the MG5 report, the panel invited further submissions from Mr Buxton, on your behalf, and Ms Alabaster, on behalf of the NMC.

Mr Buxton submitted that the MG5 report contains hearsay evidence from a police officer who has not been called to give evidence at this hearing. He reminded the panel that this summary made by the police officer dealing with the incident was not relied upon as a basis for the convictions, and that you would have no effective means of challenging this evidence.

[PRIVATE]. He submitted that you were never charged in relation to this, nor is there any other supporting evidence from a primary source to back this allegation up.

Mr Buxton submitted that the information contained within the MG5 report is effectively the sole and decisive evidence relating to your conduct around the time the door to the sluice was opened.

Mr Buxton submitted that the MG5 report did not form part of the findings of facts in relation to these offences. He submitted that there is nothing to convince or persuade the panel that the account provided in the MG5 report is an accurate summary of events.

Mr Buxton submitted that should the contentious information contained within the MG5 report be allowed to remain before the panel, it would give rise to serious concerns

relating to fairness in these proceedings. He submitted that the inherent unfairness is manifest.

Ms Alabaster invited the panel to admit the contested evidence in the MG5 report. She submitted it provides important information leading to whether your fitness to practise is currently impaired, as it contextualises the background in relation to the charges.

Ms Alabaster submitted that the MG5 report was completed by a police officer and therefore has a degree of reliability. She reminded the panel that the MG5 report is not the sole and decisive evidence as there are many matters to be considered – this is just part of the evidence that the panel should be able to take account of in making a fully informed decision.

Ms Alabaster invited the panel to admit the MG5 report into evidence as it is relevant and fair, and falls within the scope of Rule 31 of the Rules.

The panel heard and accepted the advice of the legal assessor who advised that matters which were agreed could be admitted into evidence, but in respect of matters not so agreed, then the tests in the case of *Thorneycroft* and *El Karout* should be applied to determine admissibility.

The panel noted that the MG5 report contained secondary hearsay, and that you had not had the opportunity to test this evidence at any stage.

The panel determined that there was no good reason why the witness had not been called to give live evidence at this hearing. It was of the view that it would be unfair and prejudicial to you to admit the contested elements of the MG5 report into evidence in the circumstances.

Application to adjourn

Ms Alabaster invited the panel to adjourn this hearing. She submitted that the matters raised within the contested material are important and that evidence of them should go before the panel for adjudication. She referred the panel to the case of *PSA v NMC & Jozi [2015] EWHC 764 (Admin)*.

Ms Alabster submitted that the panel had found the evidence in the MG5 report to be inadmissible only because of the way it was presented. She accepted that the panel would prefer to hear live evidence in relation to this matter. She invited the panel to have regard to its overarching objective in protecting the public, and asked that the NMC be allowed the time to correct the position and put the full regulatory concerns before it. She submitted that the inadmissibility of the MG5 report should not of itself prevent the full extent of the issues from being considered by this panel.

Ms Alabaster submitted that the panel should consider fairness to you and to the regulator in what it is trying to achieve in the pursuance of safeguarding the public. She submitted that the NMC has not acted improperly, but that matters have arisen as the hearing has progressed. She further submitted that not considering these serious issues will have a detrimental effect on the public's perception of the NMC as its regulator should the panel not go on to consider the full regulatory concerns, now it understands the seriousness of these matters.

Ms Alabaster submitted that the NMC does not clearly understand what exactly is contested by you in the MG5 report.

Ms Alabaster submitted that the situation can be remedied and that there are a multitude of options available to the NMC in how it progresses with this case. She submitted that the NMC may be able to obtain the facts upon which the convictions are based, and that Harrow Crown Court may have the transcript of the criminal appeal.

In the alternative, Ms Alabaster submitted that the NMC may be able to call live evidence to be given by witnesses at this hearing, which would enable their evidence to be tested within this regulatory forum and their credibility assessed. She also submitted that further evidence may be adduced now the NMC knows what matters are to be contested before the panel.

Ms Alabaster submitted that the panel has not read the charges against you at this hearing and, as such, it is not seised of the case at this stage.

Mr Buxton objected to the NMC's application to adjourn this hearing. He submitted that you have attended this hearing via video link from Canada, and that you are looking for a conclusion to these matters.

Mr Buxton submitted that the NMC have so far been unable to obtain evidence of the facts upon which the convictions are based. He submitted that enquiries have already been made as to whether there is a transcript available from the Crown Court and there is not. He further submitted that the NMC may not be able to call live witness evidence.

Mr Buxton submitted that your conviction relating to tramadol was not based on the contested evidence of Dr 1.

Mr Buxton submitted that in adjourning this hearing, the panel ran the risk of remaining in the same position the next time this case is re-listed. He submitted that it is unclear where this case is going, but at this current time, there is a properly constituted panel who are present and able to hear this case which may go part-heard due to the legal arguments had today. Mr Buxton submitted that no blame should be apportioned to either side.

Mr Buxton submitted that the NMC decided to proceed with this matter on the basis of conviction.

Mr Buxton submitted it would not be fair to you to adjourn these proceedings, with you then being invited back before your regulator without knowing what the NMC are intending to provide by way of evidence which may, or may not be available. He invited the panel to read the charges to be seised of the matter, and make progress with this case.

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

The panel noted that the background mischief being alleged by the NMC is not currently captured by the charges. It had regard to the case of ***Jozi***, and took account of the NMC's overarching objective in ensuring that the public are sufficiently protected.

The panel took no negative view of either party's conduct at this hearing, as a result of the arguments surrounding the admissibility of the evidence contained within the MG5 report.

In having sight of the MG5 report, the panel considered there to be serious concerns in relation to your conduct which would suitably engage the public interest in having these concerns considered as part of these regulatory proceedings. It determined that whilst you may be disadvantaged if the panel were to adjourn this hearing today, your interests were outweighed by the public interest in airing these matters at a substantive hearing. Therefore, the panel was of the view that it was not fair to proceed with this matter today, after having been made aware of what would be alleged to be the underlying nature of your convictions, and the seriousness of the case.

However, the panel noted that there was insufficient time to produce and finalise written reasons of the earlier applications made by the parties, and that it would be going part-heard on this case in any event. The panel considered this to provide a natural break in proceedings which would provide the NMC with the opportunity to gather its evidence to put before the panel when this matter resumes. The panel noted that although it is not seised of this matter as the charges have not been read, it would need to return to

finalise its written reasons. Therefore, the panel decided to adjourn this matter today. It handed down this decision orally to the parties to allow the NMC to restructure its case.

The panel determined that as this matter was already going part-heard, it would be fair to both parties to inform them of the panel's decision to adjourn, in order for the NMC to provide the evidence it needed to rely on, to you when this matter resumes. The panel was of the view that there would be no injustice to you in allowing evidence to be adduced and tested through live evidence if it is possible to receive it in this regulatory setting, as it acknowledged that you have not had the opportunity otherwise to test the evidence contained in the MG5 report. The panel identified two potential dates for this matter to resume on, namely, 22 August 2019 and 20 September 2019.

Decision on Service of Notice of Resuming Hearing

The panel was informed at the start of this hearing that Mr McKerral was not in attendance, nor was he represented in his absence.

Written notice of this resumed hearing had been sent to Mr McKerral's registered address by recorded delivery and by first class post on 18 July 2019. The Royal Mail International Tracked and Signed service did not confirm that the notice of a resumed hearing had been delivered to Mr McKerral's registered address. However, it did indicate that the notice of hearing document had been handed to the Royal Mail's delivery partner in Canada on 9 August 2019. Further, the panel noted that notice of this hearing was also sent to Mr McKerral's representative at the RCN on 22 July 2019.

The panel took into account that the notice letter provided details of the time, date and venue of the resuming hearing.

Ms Alabaster submitted the NMC had complied with the requirements of Rules 32(3) and 34 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004, as amended ("the Rules"). She submitted that there is not a formal notice period that is required for a resuming hearing, however, the NMC must notify the registrant of when this matter is listed to resume. Ms Alabaster also reminded the panel that Mr McKerral was aware of the resuming date as it was discussed with him at the last hearing.

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr McKerral has been served with notice of this hearing in accordance with the requirements of Rules 32(3) and 34.

Decision on proceeding in the absence of the Registrant

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

The panel had regard to Rule 21 (2) 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.

Ms Alabaster invited the panel to continue in the absence of Mr McKerral on the basis that he has voluntarily absented himself. She submitted that Mr McKerral was aware of the resuming hearing.

Ms Alabaster referred the panel to an email dated 21 August 2019 from the RCN which was sent to the NMC in advance of this resumed hearing. This email states: “Please note I have informed the Registrant of the new position, and he will not be attending the Resumed Hearing, nor will he be represented”. Furthermore, Ms Alabaster informed the panel that on 21 August 2019, the RCN contacted the NMC case officer to notify him that they are no longer representing Mr McKerral, and that all future correspondence should be sent to him directly.

Ms Alabaster informed the panel that the NMC had sent an email to Mr McKerral this morning to find out if he wished to attend today's hearing, acknowledging that he is no longer represented by the RCN as of 21 August 2019, but recognising that he could still engage with these proceedings should he wish to do so. Further, she stated that the NMC has also made attempts to contact Mr McKerral by telephone during the course of the morning without success.

However, Ms Alabaster submitted that it is clear from the RCN's correspondence prior to them asking to be removed from Mr McKerral's record that he does not intend to engage further with these proceedings. She submitted that he has not made himself available this morning via any method the NMC have previously contacted him on, namely, email and telephone.

Ms Alabaster submitted that there has been no request for an adjournment in relation to these proceedings and, as a consequence, there was no reason to believe that an adjournment would secure Mr McKerral's attendance on some future occasion.

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 is not absolute and is 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 *R (on the application of Raheem) v Nursing and Midwifery Council [2010] EWHC 2549 (Admin)* and the ruling of Mr Justice Holman that:

> *"...reference by committees or tribunals such as this, or indeed judges, to exercising the discretion to proceed in the person's absence "with the utmost caution" is much more than mere lip service to a phrase used by Lord Bingham of Cornhill. If it is the law that in this sort of situation a committee or tribunal should exercise its discretion "with the utmost care and caution", it is extremely*

important that the committee or tribunal in question demonstrates by its language (even though, of course, it need not use those precise words) that it appreciates that the discretion which it is exercising is one that requires to be exercised with that degree of care and caution."

The panel has decided to proceed in the absence of Mr McKerral. In reaching this decision, the panel has considered the submissions of the case presenter, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *Jones*. It has had regard to the overall interests of justice and fairness to all parties. It noted that:

- no application for an adjournment has been made by Mr McKerral;
- Mr McKerral had contacted the NMC through the RCN to inform it that he would not be attending the resuming hearing, nor would he be represented, prior to the RCN informing the NMC that they are no longer acting for Mr McKerral.
- there is no reason to suppose that adjourning would secure Mr McKerral's attendance at some future date;
- the charges relate to events that occurred in 2017;
- there is a strong public interest in the expeditious disposal of the case.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr McKerral.

Mr McKerral later responded to the NMC case officer's email sent on the morning of the resumed hearing. In this email, Mr McKerral stated "I am aware the RCN will not be representing me, it was not an easy decision to make. This occurred last evening August 21 2019. I will not be representing myself as I am now disengaged from the process. I will not be attending the meeting. Please accept my apologies, I had hoped the RCN had contacted the NMC and reported this. I apologies for any inconvenience this may have caused."

Details of charge:

That you a Registered Nurse

1. At Willesden Magistrates Court on 31 May 2018 were convicted of the following offences:-

(a) On 22 December 2017 at Northwick Park Hospital you had in your possession a quantity of Tramadol, a controlled drug of Class C, in contravention of section 5(1) and/or section 5(2) and/or Schedule 4 of the Misuse of Drugs Act 1971; and

(b) On 22 December 2017 at Northwick Park Hospital you assaulted Dr 1 by beating her contrary to s.39 of the Criminal Justice Act 1988

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

Background

The NMC received a referral from London North West Healthcare NHS Trust ("the Trust") on 22 December 2017, in relation to Mr McKerral's conduct whilst he was working as a registered nurse on shift in theatre recovery at Northwick Park Hospital ("the Hospital"), on behalf of Medics Pro Agency ("the Agency").

It is alleged that during the shift of 22 December 2017, Mr McKerral went into the sluice at the Hospital, which is a room where dirty items can be disposed of. It was allegedly reported to other members of staff that there was somebody in the sluice and that they could be having difficulty. Dr 1 attended the sluice to establish what was happening and, upon trying to enter the room, she was kicked in her knee by Mr McKerral.

[PRIVATE].

Both security and the police were called to attend the incident. Mr McKerral emerged from the sluice some time later.

Mr McKerral was searched by the police, and a packet of Tramadol was found in his possession. He was arrested and taken to the police station.

Mr McKerral was charged with the relevant offences and was convicted on 31 May 2018 at Willesden Magistrates Court. He initially received a suspended sentence order, but he appealed his two convictions. The convictions in this case were upheld, however, Mr McKerral was successful in appealing his sentence which was reduced to a fine of £750 for the assault, and a fine of £250 for the possession of a Class C drug. He was also ordered to pay compensation of £500 to Dr 1, costs of £400, and a victim surcharge of £100. The total financial penalty imposed on Mr McKerral was to the sum of £2,000. Mr McKerral was given nine months to pay this sum, with a 14 day sentence of imprisonment if he failed to pay during this time.

At the time of the original listing of this hearing on 3 May 2019, Mr McKerral had not paid his fine, albeit the time period for it had not yet expired. Today, at the resuming hearing, the time period to pay this fine has now expired. However, despite the RCN, who had previously represented Mr McKerral, stating that Mr McKerral had since paid this fine, the NMC has not received confirmation of this.

Decision on the findings on facts and reasons

The panel noted that the charges concern your convictions and, having been provided with a copy of the certificates of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3) of the Rules which 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
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> (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.
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> (3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.

The panel also had regard to the transcript of the Appeal Hearing at Harrow Crown Court. It considered this to provide contextual information upon which Mr McKerral's convictions are based.

Submissions on impairment:

Having announced its finding on all the facts, the panel then moved on to consider whether Mr McKerral's fitness to practise is currently impaired by reason of his convictions. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

In her submissions, Ms Alabaster referred the panel to the cases of *Meadow v GMC [2007] 1 All ER 1* and *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin)*.

Ms Alabaster submitted that the facts underlying Mr McKerral's convictions are directly linked to his practice as a registered nurse as the offences occurred whilst at work. She submitted that Mr McKerral was convicted of assaulting a colleague who was a medical professional. [PRIVATE].

[PRIVATE]. Patients in the vicinity of the sluice had to be calmed down as they had witnessed the ongoing incident.

Ms Alabaster submitted that Mr McKerral's conduct had the potential to put patients and colleagues at an unwarranted risk of harm.

Ms Alabaster submitted that Mr McKerral's conduct has brought the nursing profession into disrepute. She submitted that Mr McKerral had access to the medication because of his privileged position as a registered nurse. Furthermore, a fully informed member of the public would consider Mr McKerral's actions in assaulting a medical colleague to be conduct unbefitting of the nursing profession.

Ms Alabaster invited the panel to find that Mr McKerral's actions breached fundamental tenets of the nursing profession. She referred the panel to *The Code: Professional*

standards of practice and behaviour for nurses and midwives (2015) ("the Code") and identified where, in the NMC's view, Mr McKerral's actions fell short of the standards expected of a registered nurse.

Ms Alabaster invited the panel to consider whether Mr McKerral's conduct is capable of remediation, whether it has been remediated, and whether it is highly likely to be repeated in future.

Ms Alabaster submitted that criminal convictions are often more difficult to remediate than clinical nursing failings. She submitted that Mr McKerral would need to demonstrate that the public interest elements of the case have been satisfied.

Ms Alabaster submitted that Mr McKerral only has limited insight in relation to his conduct that occurred on shift on 22 December 2017. She invited the panel to have regard to Mr McKerral's reflective piece that had been sent to the NMC in advance of the original substantive hearing.

Ms Alabaster submitted that Mr McKerral denied his criminal activity in court, as is his right, but there is little evidence to show that, once convicted, lessons have been learnt, or how his actions could have impacted public confidence in the nursing profession. Ms Alabaster referred the panel to the case of *Pillai v GMC [2015] EWHC 305 (Admin)*, and invited the panel to take account of Mr McKerral's conduct during the original listing of this substantive hearing. Specifically, she asked why he instructed his representative to make submissions on his behalf which are now proven to have been demonstrably inaccurate, now that the transcript of the Appeal Hearing at Harrow Crown Court has been adduced. Ms Alabster submitted that Mr McKerral was provided the opportunity to test the evidence of the witnesses in this case during the criminal trial, [PRIVATE]. Specifically in relation to the above, she submitted that Mr McKerral saw an opportunity to try and manipulate the position to be looked at more favourably for him, on the basis that it was unlikely to be proved one way or another if the transcript from the Appeal Hearing at Harrow Crown Court could not be obtained.

[PRIVATE].

In light of all the above, Ms Alabaster submitted that in the absence of any evidence to the contrary, there is a real risk of repetition of these events.

The panel has accepted the advice of the legal assessor.

Decision on impairment

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 the panel considered the judgement of Mrs Justice Cox in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin)* in reaching its decision, in paragraph 74 she said:

> 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. …

The panel finds that limbs a, b and c are engaged as above.

The panel noted that whilst the convictions did not relate to his clinical nursing practice, Mr McKerral's conduct occurred on the work premises, whilst he was on duty.

The panel had regard to the case of *Cohen v GMC [2008] EWHC 581 (Admin)* in considering whether Mr McKerral's conduct is capable of remediation, whether it had been remediated, and whether it is likely or not that the conduct would be repeated in future.

The panel was of the view that criminal convictions would always be more difficult to remediate than clinical nursing errors.

The panel noted that Mr McKerral attended the original listing of this hearing via video link, and that he did not at that stage, have the opportunity to give live evidence to the panel. Mr McKerral had the opportunity to attend the resuming hearing via video link, however, he chose not to do so, and therefore did not offer up any further evidence since the NMC had obtained the transcript from the Appeal Hearing at Harrow Crown Court.

The panel read Mr McKerral's undated reflective piece which was handed to the panel by Ms Alabaster out of fairness to Mr McKerral. Whilst, Mr McKerral had reflected on the impact of his actions and had apologised for his behaviour, the panel only considered Mr McKerral to have demonstrated limited insight in relation to the circumstances leading to his convictions. It did not consider him to have accepted the events as they had happened, as proven during the criminal trial, nor sufficiently addressed the impact his actions had on patients, colleagues and the nursing profession.

The panel acknowledged Ms Alabaster's submission on the possibility of Mr McKerral having attempted to exploit a lacuna in the NMC's evidence as he had originally been informed that a transcript of the Appeal Hearing at Harrow Crown Court did not exist. This transcript later became available, and it demonstrated that Mr McKerral did have, and took, the opportunity to test the evidence of witnesses, specifically Dr 1, during the criminal trial. [PRIVATE].

The panel noted that Mr McKerral had not provided any evidence of re-training in relation to his conduct. [PRIVATE].

In the absence of full reflection and any training to demonstrate that Mr McKerral has attempted to remediate his wrongdoing, the panel was not satisfied that he had been able to demonstrate that his fitness to practise is not currently impaired.

In light of the above, the panel concluded that there was a clear risk of unwarranted harm to patients in Mr McKerral's care, should he be permitted to practise as a nurse without some form of restriction. It considered Mr McKerral to have brought the profession into disrepute and found him to have breached a fundamental tenet of the nursing profession [PRIVATE]. Furthermore, it also considered there to be a real risk of repetition of the incidents found proved. Therefore, the panel decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health safety and well-being of the public and patients, and to uphold/protect 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.

The panel also considered there to be an extremely high public interest in the consideration of this case. It was of the view that a fully informed member of the public would be seriously concerned by Mr McKerral's two convictions, compounded by the contextual background in this case, namely, [PRIVATE], and that he had assaulted a colleague who was a medical profession whilst on shift at work. The panel was of the view that even if it had not found that there were remaining public protection concerns, the public interest in this case would have required a finding of impairment be made on its own merits. Therefore, the panel determined that a finding of impairment on public interest grounds is also required.

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

Determination on sanction:

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mr McKerral's name off the register. The effect of this order is that the NMC register will show that Mr McKerral has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case.

Ms Alabaster invited the panel to impose a striking-off order. She submitted that the NMC had informed Mr McKerral of its sanction bid prior to commencing this hearing, and it is not departing from this.

Ms Alabaster took the panel through the aggravating and mitigating factors she considered to be engaged in this case.

Ms Alabaster submitted that Mr McKerral's conduct is serious enough to warrant permanent removal from the NMC register, and that public confidence in the nursing profession would be undermined if this were not done.

Ms Alabaster submitted that as there are live public protection concerns evident in this case, no further action and a caution order are inappropriate in the circumstances.

Ms Alabaster submitted that there are concerns around the workability of a conditions of practice order as Mr McKerral is not currently living in the UK, nor has he provided any information as to what his future intentions are. Ms Alabaster submitted that there appears to be a lack of understanding on the part of Mr McKerral as to what caused his behaviour on the shift of 22 December 2017, therefore, it would not be possible to have targeted or structured conditions to address the concerns identified. Furthermore, she

submitted that a conditions of practice order may not adequately meet the public interest considerations identified in this case in any event.

Ms Alabaster submitted that any conviction represents a serious departure from the professional standards of a registered nurse. She submitted that Mr McKerral does not appear to appreciate the implications his actions had on the public's perception of registered nurses.

Ms Alabaster invited the panel to find that Ms McKerral's convictions were incompatible with ongoing registration. She submitted that Mr McKerral had [PRIVATE] and injured a colleague who was a medical professional. Furthermore, she also asked the panel to take account of Mr McKerral's conduct at the original listing of this hearing, as he may have attempted to mislead the panel by allowing submissions to be made on his behalf, which he knew were not true.

Ms Alabaster submitted that there is evidence of a clear attitudinal concern. She submitted that a striking-off order would uphold public interest, and send a clear message to the nursing profession to demonstrate that this kind of behaviour will not be tolerated.

The panel accepted the advice of the legal assessor.

The panel has borne in mind that any sanction imposed must 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.

As regards aggravating factors, the panel has considered the following as relevant:

- The conduct related to Mr McKerral's convictions occurred in the workplace whilst he was on shift in an acute nursing ward, in the proximity of colleagues and patients.
- [PRIVATE].
- Mr McKerral had only demonstrated limited insight into his convictions.
- Mr McKerral attempted to mislead the panel through his representative during the original listing of this hearing, due to their being a lacuna in the NMC's evidence at the time.

The panel did not consider there to be any mitigating factors in this case.

The panel noted that there had initially been some engagement with Mr McKerral during these proceedings. The panel was also provided with the reflective piece that he had submitted for a different part of the NMC process.

The panel first considered whether to take no action or to engage in mediation but concluded that this would be inappropriate in view of the seriousness of the case.

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 and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel determined that Mr McKerral's convictions were not at the lower end of the spectrum of impaired fitness to practise, and that a caution order would be inappropriate in view of the seriousness of the case.

The panel next considered whether placing conditions of practice on Mr McKerral'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 determined that there were no practical or workable conditions of practice that could be formulated, given the nature of the concerns identified. It noted that the concerns identified did not relate to Mr McKerral's clinical nursing practice, and that the behaviour exhibited by him could be demonstrative of an entrenched attitudinal problem. Therefore, the panel concluded that a conditions of practice order was an insufficient response to the concerns, as they could not be adequately addressed through a conditions of practice order.

Furthermore, the panel concluded that placing conditions on Mr McKerral's registration would not adequately address the public interest concerns relating to the reputation of the profession which arose in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel noted that whilst a suspension order would prevent Mr McKerral from working as a registered nurse for a period of up to 12 months, it could not be satisfied that imposing this sanction would satisfy the public protection and public interest concerns in this case.

The panel took account of the aggravating factors in Mr McKerral's case, in particular, his attempts to mislead the panel through his representative, Mr Buxton, during the original listing of this hearing, as he had provided instructions that were not based on his personal knowledge of what happened during his criminal court hearings. It was only when the transcript from the Appeal Hearing at Harrow Crown Court was provided did Mr McKerral disengage from the NMC process. This showed that Mr McKerral had attempted to distort the events of what had occurred on that day.

[PRIVATE]. Further, he had only shown a limited amount of insight into his conduct, and has not appreciated the extent of his behaviour.

The conduct, as highlighted by the convictions, represented significant departures from the standards expected of a registered nurse. The panel considered that the serious

breaches of fundamental tenets of the nursing profession, evidenced by Mr McKerral's actions, were fundamentally incompatible with his remaining on the register.

The panel therefore determined that a suspension order would not be a sufficient, appropriate or proportionate sanction in the circumstances of this case.

The panel was of the view that the findings in this particular case demonstrate that Mr McKerral's conduct was serious, and it considered that in allowing him to maintain NMC registration would put the public at a continued risk of harm, and undermine public confidence in the profession and in the NMC as a regulatory body.

Considering all of these factors, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular, the effect of Mr McKerral's conduct in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct themselves, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

Determination on Interim Order

The panel has considered the submissions made by Ms Alabaster that an interim order should be made on the grounds that it is necessary for the protection of the public and it is otherwise in the public interest.

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension order is necessary for the protection of the public and is otherwise in the public interest. 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. The order is necessary for the protection of the public and otherwise in the public interest.

The period of this 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 McKerral is sent the decision of this hearing in writing.

That concludes this determination.