

Nursing and Midwifery Council
Fitness to Practise Committee
Substantive Hearing
10 January 2020

Nursing and Midwifery Council, Temple Court, 13a Cathedral Road, Cardiff, CF11 9HA

Name of registrant:	Nuno Rafael Neves Rodriques
NMC PIN:	09Y0002C
Part(s) of the register:	Registered Nurse – Adult Nursing
Area of Registered Address:	England
Type of Case:	Conviction
Panel Members:	Catrin Davies (Chair – Lay member) Claire Rashid (Registrant member) Matthew Fiander (Lay member)
Legal Assessor:	Charles Parsley
Panel Secretary:	Vicky Green
Mr Rodriques:	Not present and not represented in his absence
Nursing and Midwifery Council:	Represented by Sylvia McLean, Case Presenter
Facts proved (by way of conviction):	1
Fitness to practise:	Impaired
Sanction:	Striking off order
Interim Order:	Interim suspension order – 18 months

Details of charge:

That you, a registered nurse:

- 1) On 16th April 2019 at the Crown court at Plymouth, were convicted of attempting to engage in a sexual communication with a child, an offence contrary to section 15A of the Sexual Offences Act 2003

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

Decision on Service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Rodriques was not in attendance and that written notice of this hearing had been sent to his registered address by recorded delivery and by first class post on 6 December 2019. Notice of this hearing was also sent to Mr Rodriques' representative at the Royal College of Nursing (RCN) on 6 December 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 Rodriques' right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Ms McLean 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 Rodriques has 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 Rodriques

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

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 McLean drew the panel's attention to an email from Mr Rodrigues' representative at the RCN to the NMC dated 8 January 2020 in which the following was stated:

'I can confirm that Mr Rodrigues will not be in attendance, nor will he be represented. I will be sending written submissions for the panel's consideration.'

Ms McLean invited the panel to continue in the absence of Mr Rodrigues on the basis that he has voluntarily absented himself. Mr Rodrigues has indicated, through his representative, that he is content for this hearing to proceed in his absence and he has not requested an adjournment. Ms McLean invited the panel to proceed in the absence of Mr Rodrigues.

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 has decided to proceed in the absence of Mr Rodriques. 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:

- Mr Rodriques has indicated that he is content for the hearing to proceed in his absence;
- no application for an adjournment has been made by Mr Rodriques;
- there is no reason to suppose that adjourning would secure his attendance at some future date;
- there is a strong public interest in the expeditious disposal of the case.

In these circumstances, the panel decided to proceed in the absence of Mr Rodriques.

Decision and reasons on application pursuant Rule 19

Ms McLean drew the panel's attention to the RCN written submissions in which they made an application, pursuant to Rule 19 of the Rules, for all of the hearing to be held in private on the basis that there would be reference to Mr Rodriques' personal life and his family.

Ms McLean submitted that this hearing should be heard in public. She submitted that any reference to Mr Rodriques' personal life or family could be heard in private.

The legal assessor reminded the panel that while Rule 19 (1) provides, as a starting point, that hearings shall be conducted in public, Rule 19 (3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that there may be reference to Mr Rodriques' personal life or family, the panel determined to hold such parts of the hearing in private. The panel determined to

rule on whether or not to go into private session in connection with these matters should such matters arise.

Decision on the findings on facts and reasons

The charge concerns Mr Rodriques' conviction. The panel had regard to Rule 31 (2) of the Rules:

- (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

Having been provided with a copy of the certificate/memorandum of conviction, the panel finds that the facts are found proved in accordance with these Rules.

Background

On 26 March 2019 the NMC received a referral from Devon & Cornwall Police (the Police). At the material time, Mr Rodriques was working at Derriford Hospital, Plymouth as a registered nurse in the accident and emergency department.

An undercover police operative was tasked with the role of creating and assuming the persona of a 13 year old female girl named '*Maisie*'. The purpose of the operation was to gather intelligence regarding potential sexual abusers of children and in order to achieve that aim, the undercover operative created an email and a Messenger account and used platforms including Skype and Kik Messenger. The undercover police operative also created a profile picture of a 13 year old girl.

Mr Rodriques made initial contact with 'Maisie' on 27 February 2019 and engaged in private conversations during which the undercover operative clearly stated that 'Maisie's' age was 13. The overall tenor of the conversations was highly sexualised in nature and they continued for some weeks. The behaviour culminated with Mr Rodriques sending 'Maisie' images of his erect penis and videos of him masturbating. He also invited 'Maisie' to masturbate.

Mr Rodriques made a Skype call to 'Maisie' on 11 March 2019 and during that call he appeared to have been making arrangements with 'Maisie' to meet her. No meeting took place. Mr Rodriques' behaviour was brought to an end on 25 March 2019 when the police executed a search warrant at his home address, and he was arrested.

On 16 April 2019, upon his guilty plea, Mr Rodriques was convicted of an offence of attempting to engage in a sexual communication with a child and was sentenced to:

'10 months imprisonment suspended for 2 years with Horizon Accredited Programme requirement and 16 RAR days.

SHPO for 2 years.

SOR for 10 years.

Vetting and barring applies - children's list'

Submissions on impairment

Having announced its finding on the facts, the panel then moved on to consider whether Mr Rodriques' fitness to practise is currently impaired. 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 on the issue of impairment Ms McLean addressed the panel on the need to have regard to protecting the public and the wider public interest. This included

the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. Ms McLean referred the panel to the cases of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).

The panel noted the RCN's written submissions on impairment dated 8 January 2020:

'Mr Rodrigues accepts that his judgement in engaging in this conduct fell far below the standards of not only a reasonable member of the public, but also someone engaged in the nursing profession.'

'It is accepted that the conduct in question would amount to misconduct within the definitions of the NMC proceedings. Furthermore, it is accepted that Mr Rodrigues' fitness to practice is impaired as a result of this. Although the conviction does not relate to Mr Rodrigues' role as a nurse, the seriousness of the conviction is such that a finding of impairment on the grounds of the public interest is required.'

Decision on impairment

The panel considered whether, as a result of this conviction, Mr Rodrigues' fitness to practise is currently impaired.

The panel accepted the advice of the legal assessor.

The panel has had careful regard to the excerpts from Mr Rodrigues' 'chats' with 'Maisie' in which he made highly sexually explicit suggestions.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. They must make sure that

their conduct 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 in this case, both in terms of Mr Rodriques' past behaviour, and the likelihood that he will behave in such a way in the future.

The panel considered the nature and the particular circumstances of Mr Rodriques' behaviour which led to his conviction. The panel accepted that his actions were not related to his clinical practice. However, had '*Maisie*' been the 13 year old child that Mr Rodriques believed she was, his communications would have been seriously harmful to her.

Given the nature and seriousness of Mr Rodriques' conviction, the panel determined that he breached fundamental tenets of the nursing profession and he brought the nursing profession into disrepute.

The panel then considered the risk of repetition. It considered the level of insight Mr Rodriques has demonstrated. The panel considered whether the conduct that gave rise to the conviction is capable of being remedied and, if so, whether it has been remedied. In considering the risk of repetition the panel noted that there was no information as to his progress with his rehabilitation programme.

In relation to insight, the panel had regard to an undated reflective statement written by Mr Rodriques. Whilst Mr Rodriques has expressed remorse for his actions and stated

that he would never repeat them, he failed to demonstrate any recognition of the wider impact of his shortcomings on the profession as a whole and the wider public. The panel considered that Mr Rodriques' insight was limited.

Given the nature of the conviction, the panel was of the view that Mr Rodriques' actions raised serious attitudinal concerns. The panel noted that attitudinal concerns are inherently difficult to remediate. Mr Rodriques has not demonstrated that he has remediated the behaviour. The panel was therefore of the view that the public remains at risk of harm if he were able to practise without restriction. The panel finds that Mr Rodriques' fitness to practise is impaired on the ground of public protection.

The panel went on to consider whether the need to uphold proper professional standards and maintain public confidence in the profession would be undermined and the reputation of the profession brought into disrepute if a finding of impairment of fitness to practise were not made. The panel considered that if a member of the public were made aware of all the circumstances of this case, they would expect a finding of impairment on public interest grounds. The panel considered that a finding of current impairment was required in order to maintain public confidence in the profession, and in the NMC as a regulator and to uphold proper professional standards. The panel therefore concluded that a finding of impairment was necessary in the public interest.

The panel determined that Mr Rodriques' fitness to practise is currently impaired by reason of his conviction both on the grounds of public protection and the wider public interest.

Determination on sanction

The panel heard submissions from Ms McLean on behalf of the NMC. It also had regard to the written submissions sent by the RCN on behalf of Mr Rodriques. The NMC sanction bid was for a striking off order. The RCN, in its written submissions, invited the panel to consider imposing a suspension order for a period of 12 months.

The panel has considered this case very carefully and decided to make a striking off order. The effect of this order is that the NMC register will show that your name 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. 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.

The panel identified the following aggravating and mitigating factors:

Aggravating:

- The nature and seriousness of the conviction;
- Persistent course of conduct which escalated over a three week period with a person who he believed to be a child.

Mitigating:

- Mr Rodriques made full admissions at an early stage and maintained these throughout the regulatory process;
- He is of previous good character.

The panel first considered whether to take no action. The panel bore in mind that it had identified at the impairment stage that there remained a risk of repetition due to Mr Rodriques' limited insight and lack of remediation. As such, any repetition of Mr Rodriques' behaviour would bring with it unwarranted risk of harm to patients and the public. To take no action would therefore not provide protection to the public and would be inconsistent with the panel's findings at the impairment stage. In addition, the panel considered that to take no further action would be wholly inadequate given the seriousness of the conviction and the need to declare and uphold standards, and to maintain the public's confidence in the profession and the NMC.

Next, in considering whether a caution order would be appropriate, 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 was clear that Mr Rodriques' impairment was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the conviction and also in view of the panel's finding on impairment. A caution order would offer no protection to the public, as it would not restrict Mr Rodriques' practice. In addition, the panel considered that to make a caution order would be wholly inadequate given the seriousness of the conviction and the need to declare and uphold standards, and to maintain the public's confidence in the profession and the NMC. Therefore, 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 Rodriques' registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be relevant, proportionate, measurable and workable. It is not possible to formulate conditions of practice that would address the concerns in this case. In any event, even if workable conditions of practice could have been formulated,

the panel determined that given the grave nature of the conviction, they would not meet the wider public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel took into account the SG, in particular:

‘This sanction may be appropriate where the misconduct is not fundamentally incompatible with continuing to be a registered nurse or midwife in that the public interest can be satisfied by a less severe outcome than permanent removal from the register. This is more likely to be the case when some or all of the following factors are apparent (this list is not exhaustive):

- *a single instance of misconduct but where a lesser sanction is not sufficient*
- *no evidence of harmful deep-seated personality or attitudinal problems*
- *no evidence of repetition of behaviour since the incident*
- *the Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.’*

The panel considered that Mr Rodriques’ actions would have been seriously harmful if ‘*Maisie*’ had been the 13 year old child he believed she was. This was aggravated by Mr Rodriques’ willingness, for his own sexual gratification, to act in a way which would cause harm to such a child. The public would expect an experienced nurse to be well aware of the seriousness of the harm his behaviour would have caused a child. The panel bore in mind its findings that there is a risk of repetition of the behaviour which led to the conviction. This would place patients at unwarranted risk of harm. The panel determined that Mr Rodriques’ conduct was grave and represented a significant departure from the standards expected of a registered nurse.

In the panel’s judgement, given the nature and seriousness of the conviction, public confidence in the profession and the NMC as a regulator would be undermined by the imposition of a suspension order.

Finally, in considering a striking-off order, the panel took note of the following paragraphs of 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? ...*

...This sanction is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional, which may involve any of the following factors.

- *A serious departure from the relevant professional standards as set out in key standards, guidance and advice.*
- *Doing harm to others or behaving in such a way that could foreseeably result in harm to others, particularly patients or other people the nurse or midwife comes into contact with in a professional capacity. Harm is relevant to this question whether it was caused deliberately, recklessly, negligently or through incompetence, particularly where there is a continuing risk to patients. Harm may include physical, emotional and financial harm. The seriousness of the harm should always be considered.*
- *...*
- *Sexual assault, relationships with patients in breach of guidance on clear sexual boundaries, viewing or other involvement in child pornography*
- *...*
- *...*
- *Persistent lack of insight into seriousness of actions or consequences...'*

The panel determined that Mr Rodriques' conduct was a significant and fundamental departure from the standards expected of a registered nurse. His willingness to cause

harm to a child for his own sexual gratification is fundamentally incompatible with being a registered professional. Mr Rodriques' behaviour was so serious that to allow him to continue practising as a nurse would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors, the panel determined that the only appropriate and proportionate sanction which would meet the legitimate public expectations is that of a striking-off order. It is the only order sufficient to protect the public and meet the public interest in declaring and upholding the proper standards in the nursing profession and to meet the public interest in maintaining public confidence in the nursing profession and the NMC as its regulator.

Accordingly, the panel directs that Mr Rodriques' name be removed from the Register.

Determination on Interim Order

The panel has considered the submissions made by Ms McLean that an interim order should be made on the grounds that it is necessary to protect the public and that it is in the public interest.

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension order is necessary in the public interest and to protect patients. 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 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 Rodrigues is sent the decision of this hearing in writing.

That concludes this determination.