

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

**Substantive Meeting
06 January 2021**

Nursing and Midwifery Council

Virtual Meeting

Name of registrant:	David Gwyn Swales
NMC PIN:	09F0360W
Part(s) of the register:	Registered Nurse – Adult RNA
Area of registered address:	Wales
Type of case:	Conviction
Panel members:	Anthony Kanutin (Chair, lay member) Patricia Lynch (Registrant member) Michael Glickman (Lay member)
Legal Assessor:	Graeme Henderson
Panel Secretary:	Grace Castle
Facts proved:	Charges 1 and 2
Facts not proved:	None
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim order:	Interim suspension order (18 months)

Decision and reasons on service of Notice of Meeting

The panel was informed at the start of this meeting that the Notice of Meeting had been sent to Mr Swales' registered email address on 30 November 2020.

The panel took into account that the Notice of Meeting provided details of the allegation, the time, date and virtual nature of the meeting and that he had until 30 December 2020 to respond.

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr Swales has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Details of charge

That you, a Registered Nurse

1) On 3 March 2020 were convicted at Cardiff Magistrates Court of 2 offences of possessing an indecent images of a child, contrary to sections 160(1), (2A) and (3) of the Criminal Justice Act 1988

2) On 3 March 2020 were convicted at Cardiff Magistrates Court of distributing an indecent photograph of a child, contrary to sections 1(1)(b) and 6 of the Protection of Children Act 1978

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

Decision and reasons on facts

The charges concern Mr Swales' conviction and, having been provided with a copy of the certificate of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3). These state:

- '31.—** (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.*
- (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.'*

Background

On 3 March 2020, Mr Swales was convicted of possession and distribution of indecent images of children. Mr Swales pleaded guilty at Cardiff Magistrates Court on 5 March 2020, and was sentenced at the Crown Court on 19 March 2020 where he received a community order. Mr Swales was ordered to undertake a course of rehabilitation, to be placed on the sex offenders register for 10 years, and to be made subject to a sexual harm prevention order for 10 years.

The images in his possession were one category B image and 10 category C images. He was also found guilty of the distribution of one category C image.

Fitness to practise

Having announced its findings on the facts, the panel then considered whether, on the basis of the facts found proved, Mr Swales' fitness to practise is currently impaired by

reason of his conviction. 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.

Decision and reasons on impairment

The panel went on to decide if as a result of the conviction, Mr Swales' fitness to practise is currently impaired.

The panel accepted the advice of the legal assessor.

In this regard the panel considered the judgment 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 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

'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) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

The panel finds that the first three limbs of the test in *Grant* are engaged. The panel considered there remains a danger to patient safety due to the nature of the behaviour which led to Mr Swales' conviction. Additionally, the panel concluded Mr Swales' conviction had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to sexual misconduct extremely serious.

The panel also considered that Mr Swales has not provided any evidence of insight into his behaviours that led to the conviction and how this has impacted negatively on the reputation of the nursing profession.

In its consideration of whether Mr Swales has remedied his practice, the panel took into account that he has not provided any evidence of remediation to date. Although the panel is aware Mr Swales is being made to undertake a rehabilitation course, it noted that Mr Swales will be placed on the sex offenders register for 10 years, and the judge's sentencing remarks state Mr Swales has admitted he has a problem he needs to address. Therefore, the panel is of the view that there is a risk of repetition as Mr Swales has failed to communicate to the NMC what he is doing to address and remediate his behaviour. The panel therefore 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 determined that, in this case, a finding of impairment on public interest grounds was also required, as a member of the public would certainly find it inappropriate for a nurse convicted of serious sexual offences to remain on the register unrestricted.

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

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 Swales off the register. The effect of this order is that the NMC register will show that Mr Swales 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 and had careful regard to the Sanctions Guidance (SG) published by the NMC. The panel accepted the advice of the legal assessor.

Decision and reasons on sanction

Having found Mr Swales' fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. 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 SG, with particular reference to cases involving sexual misconduct and criminal convictions. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- The seriousness of the conduct which puts patients at risk of serious harm;
- The lack of insight into his behaviours; and
- The fact that Mr Swales breached the trust of a friend as stated in the judge's sentencing remarks.

The panel also took into account the mitigating feature that Mr Swales gave an early guilty plea.

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

It then considered the imposition of a caution order but again determined that, due to the reasons identified above, an order that does not restrict Mr Swales' practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mr Swales' 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. 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 Swales' registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The panel therefore concluded that due to the nature of the charges, conditions of practice would not be adequate. Furthermore, the panel concluded that the placing of conditions on Mr Swales' registration would not adequately address the seriousness of this case and would not protect the public, as Mr Swales has not indicated he would comply with conditions due to his lack of engagement.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- *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 conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. This was not a single instance of misconduct. There is evidence of harmful deep-seated personality or attitudinal problems. The panel has no evidence before it of any insight. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Mr Swales' actions is fundamentally incompatible with his remaining on the register. The behaviour which led to the conviction is serious, and there currently remains a risk of repetition.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in looking at 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?*

Mr Swales' actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with him remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Mr Swales' actions were serious and to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and after taking into account all the evidence before it during this case, 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 Swales' actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

In making its decision, the panel carefully considered the SG about cases involving sexual misconduct, which states the panel '*will very often find that in cases of this kind, the only proportionate sanction will be to remove the nurse, midwife or nursing associate from the register. If the panel decides to impose a less severe sanction, they will need to make sure they explain the reasons for their decision very clearly and very carefully*'. The panel found no reason as to why a lesser sanction would apply in this situation.

Therefore, the panel concluded that public confidence in the profession and the NMC as a regulator cannot be maintained unless Mr Swales is removed from the register. Additionally, the panel considered the case of *Parkinson v NMC 2010 EWHC 1898 Admin* and noted that Mr Swales has not provided any information to it today to help it consider a lesser sanction.

The panel considered that this order was necessary to protect the public, 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.

This will be confirmed to Mr Swales in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Mr Swales' own interest until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Decision and reasons on interim order

The panel was satisfied that an interim 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.

The panel therefore imposed an interim suspension order for a period of 18 months.

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

That concludes this determination.