IGE v Nursing and Midwifery Council

Case No: CO/4873/2011

High Court of Justice Queen's Bench Division Administrative Court

13 October 2011

[2011] EWHC 3721 (Admin)

2011 WL 6329359

Before: Mr Justice King

Thursday, 13 October 2011

Representation

Ms Maudsley (instructed by Davies Gore Lomax LLP) appeared on behalf of the Claimant.

Mr Pataky (instructed by the NMC) appeared on behalf of the Defendant.

Judgment

Mr Justice King:

1 This is an appeal by a registered nurse against the decision of the Nursing and Midwifery Council who, through its Conduct and Competence Committee (which I shall refer to as the Panel), on 18 April 2011 found that by reason of her conviction after trial on 16 May 2007 at the Crown Court at Harrow on two inter-related counts alleging offences of dishonesty arising out of a mortgage fraud committed in 2003 and 2004, her fitness to practise was currently impaired and imposed the sanction of striking off. The Panel further imposed an interim suspension order for a period of 18 months pending the outcome of the appeal. An appeal against the making of that interim suspension order is no longer being maintained.

2 The appellant was represented before the Panel by her solicitor and she gave evidence before the Panel at the impairment stage of their investigations. The appellant did not dispute the fact of the convictions for which she had been sentenced on 28 June 2007 by Mr Recorder Argyle to nine months' imprisonment on each count concurrent suspended for two years. She was also made subject to a confiscation order in the sum of £18,685 or in default to serve a further 12 months' imprisonment.

3 Count one of which she was found guilty alleged the obtaining of a money transfer by deception. Count two of which she was found guilty alleged the furnishing of accounts which were false. These offences were committed between November 2003 and April 2004. Between those dates the appellant had obtained some £144,000 from the Halifax Building Society when applying for a mortgage on a property by falsely representing that she was the owner of a healthcare organisation known as Ige Healthcare in 2001 to 2003. She had further in support of her application produced accounts to the building society purporting to be the annual accounts for that organisation for the years 2001 to 2003. These were false and described, as will be seen by the sentencing judge, as bogus.

4 At the time of the offending the appellant was only a student nurse at Hertford University. At the date of her trial and convictions in 2007 – some three and a half years or so later – she had qualified and was a registered nurse, having been entered on the register on 5 April 2006. She was also as at the date of trial in employment as a nurse, having on 6 November 2006 begun

employment with the Hertfordshire Partnership NHS Foundation Trust. At the date of trial she was pregnant on maternity leave. As indicated, she pleaded not guilty to the charges but was convicted after trial. In passing sentence the judge described the gravity of her offending in terms to which the Panel in the course of their conclusions made reference and upon which they put substantial emphasis. The terms were these:

> "These offences for which you were found guilty by the jury were … carefully planned, sophisticated — and this was as a transaction a carefully planned and sophisticated mortgage fraud. You obtained that mortgage by pretending that you were the owner of [Ige] Healthcare and you supplied accounts which were carefully planned and which purported to show an increasing profit for you as owner of that company. All of the accounts were utterly bogus.
>
> These offences are clearly so serious that only a custodial sentence is justified."

At another part of his sentencing remarks the judge referred to "a deliberate, carefully planned, brazen mortgage fraud and were it not for the exceptional circumstances which I have just been through, would clearly justify a — an immediate prison sentence". I might add that these offences were also committed by her husband who was convicted on the same occasion of far more wide-ranging and more serious offences. He himself was sent to immediate prison.

5 As regards the exceptional circumstances justifying suspension of the sentence the judge described them in the following terms. In essence they reflect the position of the appellant as a mother of five children, currently pregnant with her sixth child, with a husband in prison and no other means of support, who stood to lose her job and her home if she were sent to prison. The judge said this:

> "The circumstances are these: first of all that you are the mother of five young children. They are utterly dependent on you. They are entirely innocent of course and will suffer very seriously if I do send you to prison. Secondly, you are expecting a child next month and that of course your situation, if you go to prison, will be exacerbated and made worse even more.
>
> I am told that the effect of an immediate prison sentence would mean that you would lose your job, you would lose the tenancy of your home and I also have in mind the fact that your husband, Mr Ogunde, is serving a prison sentence, so you do not and will not have his support."

6 The appellant was to tell the Panel that she had informed her employers and the Nursing and Midwifery Council (the NMC) immediately of her convictions. As a matter of fact the only evidence before the Panel of her notifying her employers apart from that which she herself said, was a letter written by her in November 2007. As regards notification to the NMC the only evidence was a letter written by her in November 2008, some 18 months after the conviction. Her explanation to the Panel for the delay was that she had told her lawyers to write to both the NMC and the HR Department of her employers about her case. It was through no fault of hers that only her employer had been informed. The appellant had not returned to work immediately after her convictions as she had had her baby and the evidence before the Panel was that the baby had been born sadly with Down's syndrome. The appellant's evidence was that she had wanted both the employer and the NMC to be aware of the outcome before returning to work. On any view, however, she had self-referred her case to the NMC by 2008 and it was as a result of that self-reference that the disciplinary proceedings were instigated.

7 The Panel had before it a witness statement from the online manager of her employers, Mr Tony Cheng, dated 5 April 2010, who confirmed that he had indeed received a letter from the appellant in November 2007. The letter was before the Panel. Its contents are of some significance given the challenge which has been made throughout this appeal by Ms Maudsley on behalf of the appellant to the Panel's reasoning both on impairment and sanction, in which the Panel placed obvious significance upon the appellant's lack of remorse or insight into her actions. In the context of impairment the Panel said this:

> "…there is no evidence before the Panel that the Registrant has fully accepted her role in this, or that she has gained full insight into her actions and the gravity of her offences. The Panel accepted that the Registrant had taken the opportunity at all stages of the process, including at today's hearing, to ascribe blame and intent to others."

Again, as will be seen in the reasons on sanction, the Panel record this:

> "The Panel was particularly concerned that the Registrant was still of the view that it was unfortunate that the CPS had made a decision to prosecute as she maintained the Halifax had decided not to take matters further.
>
> The Panel was told by the Registrant that she was at fault: at fault for not reading documents; at fault for not pleading guilty. The Registrant is still maintaining that her actions were limited to signing documentation and is clearly trivialising and minimising her actions … The Panel consider that the Registrant has demonstrated an alarming lack of insight and remorse in this case."

8 I return to the contents of the letter sent by the appellant to Mr Cheng in November 2007. It patently, in my judgment, puts forward an explanation on the part of the appellant for her criminal offending which asserts in effect that she had not knowingly furnished false information to the building society but had relied upon an estate agency to make the mortgage application for her; that the agency had used totally different information from that which she had provided them and that she had only found this out for the first time as a result of that which the police investigation had discovered. In effect in this letter the appellant was asserting that she had been not guilty of any dishonesty, notwithstanding the verdicts of the jury. In the letter she attributes her being found guilty simply to the fact that she had signed the documents without reading or going through them, which was "a big mistake" on her part. The letter dated 12 November 2007 reads as follows:

> "I am writing this letter to inform you what happened. I was the one that informed my lawyer to write to NMC and HR dept (HPFT) regarding my case. When I called, I was told to tell my lawyer to write the letter to Sharon Walker at the HR.
>
> What actually happened was that my husband's brother had problem with the police and they came looking for him in my house because he had told them that he lives there. Due to the fact that they could not found him and he was not living with us, I became a victim. When the police were in my house, they found some of my documents which included my mortgage statement and they wanted to find out how I bought my property. I could not tell them much because it was my estate agency that applied for the mortgage.
>
> All the mortgage dealings were done through the estate agency, because I have never applied for a mortgage before this was my first time. I gave my work details and all earnings to the Estate agency who applied for the mortgage. To my surprise the Estate agency applied for the mortgage through Halifax telling them that I was self employed, the estate agency use totally different information from what I gave him. I only find this out for the first time through the police I was found guilty because I signed for the documents without reading or going through it which was a big mistake on my part. I was held responsible for all the things done by the estate agency because I signed the documents. I have never been to court or had any criminal record before this was why I was put on suspended sentence and told to pay some fine.
>
> I did mention on my application form before applying for this job regarding this matter.
>
> I have spoken to the NMC my self for advice and what to do, I have been told that I can go back to work because I did not abuse, assault or all do any medication error.
>
> I look forward to return to work in Elizabeth Court."

9 It is clear from the witness statement of Mr Cheng that he understood the circumstances of the

appellant's offending to be in the terms of that set out in her letter. He says at paragraph five:

> "Miss Ogunde claims that the background to her conviction was that her husband's brother had had problems with the police. The Police came looking for the brother at her house, because he told them that he lived there. The brother was not at the address but the police found some documents in regards to her mortgage statement, and wanted to know how she had bought her property. She told them that she could not tell them much because it was her estate agency that applied for the mortgage. To her surprise, it turned out that the estate agent had applied through Halifax and told them that she was self employed. The estate agent apparently used totally different information than she provided, and she only found this out through the police. She was found guilty because she signed for the documents without reading or going through them, which she states was a big mistake. As she had never been to court and did not have a criminal record, the court apparently handed her a suspended sentence and told her to pay a fine."

10 It is quite clear therefore that when it is urged on behalf of the appellant that she had made in effect a clean breast of her offending and of her convictions to her employer, this was not the correct picture. She was undoubtedly only telling her employer a limited version of her offending and at no time acknowledged to her employer the crux of the matter of which she had been found guilty, namely that she had knowingly and dishonestly at the time of the application to the building society put forward false information in order to obtain a large sum of money, including putting forward accounts which to her knowledge were wholly bogus and false. I have to say that on the material before the Panel a similar circumscribed description of the nature of offending was disclosed by the appellant to the NMC. The letter she wrote on 11 November 2008, which is relied on properly as herself referring her conviction to the NMC, states this:

> "Dear Sir/Ma,
>
> I am writing to confirm you have received a copy of the letter sent by my solicitors. Please find enclosed copy.
>
> The incident that leads to my conviction on the allegation of fraud is part of a chain of unfortunate events stemming from my husband's [affairs]. As a result of many things I have relied upon, I had no option but to accept the allegations.
>
> Having said this, I value my qualifications and registration as a nurse, something I have worked extremely hard for. I believe my integrity is in fact as achieved and [thus] wish to ensure that complete knowledge of my circumstances in 2007 has been advised."

11 Despite the careful, cogent and detailed submissions on behalf of the appellant by Ms Maudsley, I am not persuaded to any conclusion other than that a similar stance was taken by the appellant as regards her understanding and acknowledgement of her offending in the course of her evidence to the Panel.

12 In her witness statement which she put before the Panel and read into the transcript as regards the circumstances of the offending and the circumstances in which she came to be prosecuted, she said this:

> **"The conviction**
>
> In 2004, I went to a broker to purchase my property. The broker had all of my details but it is clear that he placed me as self employed to obtain the mortgage.
>
> At the time I was in Herefordshire University and I wanted my family to be living with me rather than the long travel that was affecting our family life. I had five children and one very young child at that time born in 2001. Getting her to nursery and also looking after the needs of the others was causing me to be late for lectures and causing a real strain on the family. I know that it was wrong.

> Shortly after the purchase I informed Halifax building society that I was in fact working and they accepted this and changed the details on the systems.
>
> In 2007 my husband's brother was arrested for an unrelated issue and the police went through all of our details. They found that the property had been purchased using incorrect information. I was charged and given a suspended sentence for obtaining a money transfer by deception and furnishing false information relating to accounts. Halifax were represented in court and clearly stated that they had the details of my working; they also made it clear that they were informed soon after the purchase. They also made it clear that they had no intention of bringing any charges or taking the property. The decision had been that of the CPS to prosecute.
>
> None the less I was found guilty. I was also given a charge of £18,000 to pay. This has been paid.
>
> I have had no problems in paying my mortgage and continue to hold the property.
>
> My youngest child was born during this period. I was under a great deal of stress and problems with coping with the children's needs and being pregnant. I blame myself for the fact that my son was born with Downs Syndrome."

13 I am about to set out extracts from the appellant's evidence to the Panel about how she viewed her offending. In my judgment these passages are all one way in showing that she was maintaining her position that she had signed the mortgage papers without reading them and that she had made a big mistake, but the mistake related only to the fact that she had signed the mortgage papers without reading them. She also said it was her fault and it was wrong and that she was not blaming anybody, but I have no doubt that the Panel were entitled to understand that what she was meaning by all this was in that she had signed papers without reading them for which she had to accept responsibility. The witness statement itself which she read into the transcript as part of her evidence, is explicit in what can only be an attempt to minimise the gravity of the wrongdoing by placing emphasis on the alleged facts that the building society itself had made clear that they had no intention of bringing any charges or taking the property, and that the decision to prosecute had been that of the CPS. The particular passages in the evidence she gave to the Panel orally are these. At transcript internal page 12 in the course of her being cross-examined by the case presenter, this exchange appears:

> "Q. Miss Ogunde, I just want to check what you are saying here. You pleaded not guilty at the trial, did you not?
>
> A. Yes.
>
> Q. And you told your employer it was just a mistake, did you not?
>
> A. No, I told them exactly what happened and everything, that I bought the property because I told my employer what it was relating to, because –
>
> Q. You told your employer, according to Tony Cheng, that you signed the documents without reading them. Is that correct?
>
> A. Yes, I did sign the document without reading it because I trusted the estate agent.
>
> Q. And this is what you told the criminal trial?
>
> A. That was exactly what I told them.
>
> Q. And that is what you told your employer?
>
> A. That is what I told my employer.
>
> Q. Even after you had been convicted?
>
> A. No, after being convicted I told them I was on suspended sentence for nine months but he asked me exactly what happened because he wanted to know what was the crime all about."

14 Subsequently, at page 18 of the transcript starting at line 26, there is a reference to the witness statement which she had just read out to the Panel and the question is this:

> "Q. […] again, you say effectively it was not your fault, that it was the CPS who decided to prosecute, did you not?
>
> A. It is my fault because I'm paying for it, the other way, because what I am trying to say this has come and it has put a big hole in my life, I have been found guilty of this offence, you understand? I'm not blaming anybody for my mistake, it is my responsibility to take it and this is what I am writing in here.
>
> Q. And do you remember you—
>
> A. Because what I am trying to establish is that it is my fault in the first place I signed that, it is my fault in the first place that I am found guilty, it is my fault that I did not say I was guilty and things like that. And it is my fault everything that happens because I am paying for it.
>
> Q. So what you are saying is it is your fault for signing papers without reading them …
>
> A. It is my fault.
>
> Q. … and it is your fault because you are taking the punishment for that?
>
> A. Yes, because nobody –
>
> Q. But you are not saying that what you did was deceptive or false?
>
> A. I said it is wrong. If I did — I said it is wrong because if I did not accept it is wrong that is why I cannot move on in my career, that is why I cannot do much. That is why I am at standstill, that is why I cannot apply for another job."

15 Further into her evidence, upon being re-examined by her own legal representative, she is asked this:

> "Q. Okay. Quite clearly the system in this country is very much about pleading guilty as early as possible. The evidence you have just given, you have said, 'I did not feel I was guilty when I was signing it'. You only said it once. What did you mean by that?
>
> A. I believe that I did not feel guilty when I was signing it because I believe the estate agent knew what they were doing. I needed a property and I went to them and he just told me, 'Okay, I have found a property', and he said I should not worry, there is a procedure. Then he went ahead and do because of my very busy work life. So when I sign — I just signed the document in normal, okay, that is it, we are going to put it through to Halifax and see, and I just signed the document. I never knew what I have signed until the first time I saw it at the police station, that is when I knew the details.
>
> Q. At the police station it was how many years after this?
>
> A. In it was, I think, 2006 or seven, I cannot remember. It was about — they were doing their investigation. I did not see the document until 2006 or two thousand — before I went — it was a few months before I went to court because I kept going back to the police station.
>
> Q. Okay. Did you understand clearly what the police, and what the allegation was against you? Did you understand the significance of the information that the police were using against you?
>
> A. Not really, because I have never been to a police station, I did not understand. But the first time I understood what they were talking about was when I was in the courtroom and they were breaking it down into easy to understand, because they said it is a false account. And the Halifax came in there, too, during the court proceedings which was very confusing to me.

Q. And Halifax was your mortgage company?

A. Yes.

Q. Did you at any time inform the Halifax that you were employed and not self-employed?

A. Yes, that was after the — when the — I realised what was happening. So Halifax said they do not have any charges against me, and they attend the court if the need be, and they came to the court."

16 I am quite satisfied that the Panel were fully justified in concluding on the totality of the evidence they had before them that the appellant had never accepted or recognised the dishonesty of which she had been found guilty and which was described by the judge in such graphic terms.

17 There was, however, no suggestion before the Panel that the appellant's clinical abilities were impaired. The evidence of Mr Cheng made clear that the knowledge of the conviction as explained to him by the appellant had not led the employers to reconsider the suitability of the appellant for being employed by them. He referred in paragraph seven of his witness statement to his convening a meeting with the appellant and the matron to discuss actions needed to monitor her performance. It had been decided "there was no need for her performance to be monitored as the conviction had nothing to do with her fitness to practise as a nurse". At that time the appellant was working at the Elizabeth and Victoria Court in Stevenage as a band five staff nurse and there was no evidence before the Panel that her employers had any concerns about her professional performance or with her NMC registration. Rather, the evidence was the other way. Thus in April 2009 Mr Cheng had written a positive reference about the appellant to the NMC in which he stated as follows:

"Following Jumoke conviction, a meeting was held between me and my modern matron … to discuss actions needed to monitor her (Jumoke) performance.

I am satisfied with Jumoke professional performance and have no concerns with her NMC registration.

Please contact me if you have any further queries."

18 In April 2010 the appellant was still working as a staff nurse with her employers and it is clear from the witness statement of Mr Cheng that the employers continued to have no concerns about her professional performance or her registration. Paragraph nine from the witness statement of Mr Cheng of April 2010:

"Miss Ogunde is still working as a band 5 staff nurse, based at Elizabeth and Victoria Court, Stevenage. I am still satisfied with her professional performance and have no concerns with her NMC registration."

19 Moreover, the appellant herself gave evidence to the Panel that her performance had been such that although she had been acting in the role of acting manager, since "this charge and informing the NMC, I have not been able to go for any permanent role as Manager as this has continued to hang over me for the last five years". She also told the Panel that her employers had initially placed her under supervision in relation to money management elements of her practice but this supervision had been removed. Her witness statement in terms says this:

"My employers decided that although I had no problems within my role I should be closely supervised for a period as the charge was to do with money. This was done."

The statutory framework applicable to the appeal

20 This appeal is brought pursuant to Article 38(1) of the Nursing and Midwifery Order of 2001 , providing a right of appeal to this court. The appeal and these proceedings are governed by CPR 52 and the material Practice Direction. It is common ground that this court in hearing the appeal is not limited as if on a judicial review to grounds of error of law or irrationality. The test on the appeal set out in CPR 52.11(3) is whether the decision of the Panel can be said to be wrong or unjust because of a serious procedural or other irregularity in the proceedings before the Panel. Absent any order of this court, this court does not receive evidence which was not before the Panel. Although there has been an application by the Appellant to me to submit further evidence relating to the appellant's character references and achievements on courses to do with ethical choices and problems which post the date of the Panel decision, this application was not for the purposes of the determination of this appeal. Ms Maudsley put it this way: that she would only ask me to consider this evidence if this court were to decide in her favour on the issue of sanction and were considering a lesser sanction. It is not necessary therefore for me to consider this application at this stage of my judgment or to consider the objections to receipt of that evidence made to me on behalf of the respondents by Mr Pataky.

21 Although a court will interfere with any finding of the Committee if it is satisfied its decision was wrong or unjust in the way I have described, the court has to have regard to the guidance in a series of cases, in particular *Meadow v GMC [2007] QB 462* and *Fatnani v GMC [2007] EWCA Civ 46* . These make clear that as regards any decision of the Panel which reflects a professional judgment, in particular with regard to fitness to practise in the light of any prior findings of misconduct, or on question of sanctions, this court will exercise a distinctly secondary judgment. A degree of deference has to be given to the judgments on professional matters made by the Panel. This is particularly so in relation to sanction where the Panel is not concerned with the punishment of the registrant but with the reputation or standing of the profession and the preservation of public confidence in the profession. It is well established in these circumstances that considerations which would normally weigh in mitigation of punishment have less effect. The respondent referred me in particular to paragraph 197 of Meadow where Auld LJ said this:

> "On an appeal from a determination by the GMC (actually formally in this case through the FPP … it is plain from the authorities that the Court must have in mind and give such weight *as is appropriate in the circumstances* to the following factors:
>
> i) The body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserve respect;
>
> ii) The tribunal had the benefit, which the Court normally does not, of hearing and seeing the witnesses on both sides;
>
> iii) The questions of primary and secondary fact and the over-all value judgement to be made by tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers."

22 I was also referred to Sir Thomas Bingham MR (as he then was) in Bolton v the Law Society [1993] EWCA Civ 32 at paragraph 16 in relation to sanction:

> "'Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. … All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. … The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

The approach to Impairment

23 In this case there was no issue but that the appellant had been convicted. The Panel therefore were bound to move, having regard to the contents of Article 22.3 of the Nursing and Midwifery Order 2001 , to the issue of whether or not the conviction meant that by reason thereof the appellant's fitness to practise had been impaired. The question of impairment means current impairment as at the day the Panel are considering the issue. On this point I was referred to paragraph 32 of Meadow where Auld LJ said:

> "In short, the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past."

24 Ms Maudsley, on behalf of the appellant, also referred me to the approach to the matter of impairment of fitness to practise adopted by Silber J in Cohen v GMC [2008] EWHC 581 at paragraph 62:

> "Any approach to the issue of whether a doctor's fitness to practice should be regarded as "impaired" must take account of *"the need to protect the individual patient, and the collective need to maintain confidence profession as well as declaring and upholding proper standards of conduct and behaviour of the public in their doctors and that public interest includes amongst other things the protection of patients, maintenance of public confidence in the".* In my view, at stage 2 when fitness to practice is being considered, the task of the Panel is to take account of the misconduct of the practitioner and then to consider it in the light of all the other relevant factors known to them in answering whether by reason of the doctor's misconduct, his or her fitness to practice has been impaired. It must not be forgotten that a finding in respect of fitness to practice determines whether sanctions can be imposed…"

25 Further, this passage of Silber J at paragraph 65:

> "It must be highly relevant in determining if a doctor's fitness to practice is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated. These are matters which the Panel should have considered at stage 2 but it apparently did not do so."

These passages were relied upon by Ms Maudsley in order to urge upon me the conclusion that the Panel's in reasoning on impairment – which I will set out in due course – was in error of law by in effect by not applying the correct test on the question of impairment, and not properly considering the issue of whether or not the appellant's conduct was either remediable or had been remedied. This was in particular in the context of the undoubted facts before the Panel that, as regards her dishonest offending, this had never been repeated and there was no suggestion that it had.

26 It is clear, however, that there is no test in law on the issue of impairment of fitness to practise. It is for the Panel to give such weight to the factors apparent before them as they consider appropriate in the circumstances of the facts of the particular case. I accept that if the Panel ignored an obviously relevant factor altogether in a way which undermined their judgment on impairment, this court could – and indeed should – intervene. However, this court will not intervene by reference to a disagreement with the panel as to the weight to be attached to any particular factor in the context of the facts of the particular case.

27 What is important as regards finding of impairment in this case is that the Panel clearly – as I shall demonstrate in a moment – found impairment on a public interest basis. This was not a case of clinical errors or incompetence in clinical practice. It is well established that when

considering whether a practitioner's fitness to practise is impaired by reason of misconduct, a Panel is not confined to considering simply whether the practitioner continues to present a risk to members of the public in his or her current role. The Panel is fully entitled in an appropriate case involving past conduct amounting to a criminal offence of dishonesty, to determine whether public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances. The Panel is fully entitled to reach a finding of impairment on this basis by reference to the need to uphold professional standards. This approach is reflected in a number of decisions to which I was referred. In particular I was referred to paragraph 74 of Cox J's decision in Council for Healthcare Regulatory Excellence v NMC and Paula Grant [2011] EWHC 927 (Admin) . I was referred also to the decision of Sales J in Yeong v GMC [2009] EWHC 1923 (Admin) in which he too referred to the importance of the wider public interest in assessing fitness to practise. Yeong was a case involving a doctor's sexual relationship with a patient. Sales J pointed out that the decision of Silber J in Cohen had been concerned with misconduct by a doctor in the form of clinical errors and incompetence. In such a case the question of remedial action taken by the doctor to address his areas of weakness may be highly irrelevant to the question of whether his fitness to practise is currently impaired. However, a different approach might well be called for in a case involving the sort of misconduct in Yeong and I say, in a case such as the present. In the course of his judgment, Sales J said this:

> "Where a FTPP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence."

28 As will be seen, the Panel in this case clearly considered that their finding on impairment was appropriate on the grounds of it being necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. I will consider in due course whether that was a conclusion to which they were entitled to come. The point I make at this stage is that that this is an approach to impairment they were entitled to adopt. In cases of dishonesty of the sort in this case, it matters not as a matter of principle that the conduct complained of is unconnected with the professional performance of the registrant or indeed that the matters relate to a time when the person against whom the charge is brought, as in this case, was not registered. This is made clear by Article 22(3) of the Nursing and Midwifery Order . Of course it is a relevant factor to be weighed in the balance by the Panel that the offending took place some time ago. The weight to be attributed to it however will inevitably be lessened according to the seriousness or the gravity of the offending in question. The seriousness of the offending in question may equally, according to the professional judgment of the Panel, affect the weight to be given to the factor that there has been no recurrence of the offending. The Panel in an appropriate case are still entitled, having weighed all the factors at the stage of impairment, to justify such a finding of the basis of the necessity to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession.

29 The need for nurses in particular to act in a way so as to justify the trust and confidence which the public has in them and to uphold the good reputation of the profession as a basis in an appropriate case for a finding of impairment is demonstrated in, for example, the judgment of Mitting J in Parkinson v NMC [2010] EWHC 1898 (Admin) , in particular his observations at paragraphs 9–11.

30 Before turning to the reasons of the Panel on impairment and considering the challenges to it, I refer also to the relevance to this issue of the lack of insight of the practitioner into the nature of and the extent of his or her offending. It is in my judgment obvious that the attitude of the practitioner to the offending and the events which have given rise to the conviction must in principle be a matter which can be taken into account on the question of impairment, notwithstanding the lack of complaints as to the clinical abilities and practice of the practitioner, in

order to reaffirm the clear standards of professional conduct so as to maintain public confidence in the practitioner and the profession. If authority were needed for this, I cite Mitting J in Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin) referred to by Cox J at paragraph 72 of her judgment in Grant . Mitting J said at paragraph 19 in Nicholas-Pillai :

> "In the ordinary case such as this, the attitude of the practitioner to the events which give rise to the specific allegations against him is, in principle, something which can be taken into account either in his favour or against him by the panel, both at the stage when it considers whether his fitness to practise is impaired, and at the stage of determining what sanction should be imposed upon him."

31 Indeed, I agree with the observations of Cox J in Grant at paragraph 160 where she says:

> "When considering whether fitness to practise is currently impaired, the level of insight shown by the practitioner is central to a proper determination of that issue. In this case there was no recognition or admission of wrongdoing by the Registrant, who maintained a robust defence to the charges. Even at the second stage, when misconduct and fitness to practise were in issue, the extracts from the transcript set out above indicate, in my view, that her acceptance of the allegations was based more on the fact that they had been found proved against her, than on her own recognition as to the unacceptability of what she had done."

32 It is convenient in this context if I also refer to the observations of Mitting J in Parkinson v NMC [2010] EWHC 1898 (Admin) at paragraph 18. This was a case in which the registrant had been found to have dishonestly worked for one employer while reporting sick to another. These observations refer expressly to the sanction stage but they are as follows:

> "A nurse found to have acted dishonestly is always going to be at severe risk of having his or her name erased from the register. A nurse who has acted dishonestly, who does not appear before the Panel either personally or by solicitors or counsel to demonstrate remorse, a realisation that the conduct criticised was dishonest, and an undertaking that there will be no repetition, effectively forfeits the small chance of persuading the Panel to adopt a lenient or merciful outcome and to suspend for a period rather than to direct erasure."

Lack of insight and failure to demonstrate remorse as regards matters of dishonesty are thus relevant not only to the consideration of the Panel at the impairment stage but also at the sanction stage.

The findings on Impairment

33 Let me then turn first to the finding on impairment and the reasons of the Panel. Those wer as follows:

> "The Panel having accepted the evidence that the Registrant had received the suspended custodial sentence considered whether this was evidence of impairment. Impairment has to be assessed as of today.
>
> The Panel received the parties' representations and heard from the Registrant in person. It also accepted the advice of the Legal Assessor.
>
> The Panel was directed to the following paragraphs of the NMC Code of Professional Conduct (November 2004 edition) and, in particular, the following paragraphs 1.2:
>
> > 'As a registered nurse you must [amongst other things] … act in such a way that justifies the trust and confidence the public have in you; Uphold and enhance the good reputation

of the professions.'

1.5:

'You must adhere to the laws of the country in which you are practising.'

7.1:

'You must behave in a way that upholds the reputation of the professions. Behaviour that compromises this reputation may call your registration into question, even if is not directly connected to your professional practice.'

The Panel considered that the Registrant's actions which led to her conviction for an offence involving deception and dishonesty had been in breach of these provisions.

The Registrant in her evidence stated that her actions in signing the mortgage documentation were a mistake. However, she acknowledged that she was at fault in not reading this documentation.

The Panel was directed to the judge's statements in his sentencing remarks, and, in particular, the following:"

34 There is then set out those remarks concerning the carefully planned and sophisticated mortgage fraud which I have already set out in this judgment. The Panel noted that the registrant had entered a not guilty plea during the proceedings at Harrow Crown Court. The Panel also noted from the statement of Mr Cheng, the registrant's line manager, in April 2010, that the registrant was still employed and that her employers had no concerns at that time about her clinical practice. The Panel heard from the registrant that her employers had initially placed her under supervision in relation to money management elements of her practice and this had now been removed.

35 However, this was, said the Panel, a conviction involving deception and there was no evidence before it that the registrant had fully accepted her role in this or that she had gained full insight into her actions and the gravity of the offences. The Panel accepted that the registrant had taken the opportunity at all stages of the process, including at that day's hearing, to ascribe blame and intent to others. The Panel therefore came to the conclusion that the registrant's fitness to practise was and remains today impaired.

36 Notwithstanding the cogent submissions on behalf of the appellant by Ms Maudsley, I can find nothing in the Panel's reasoning to suggest that their finding on impairment was wrong. It is said on behalf of the appellant that the Panel either ignored or failed to have proper regard to the fact that the appellant had now admitted and fully accepted her misconduct; that she had referred herself to the NMC; that there was no question of her clinical performance being deficient; and that there was no suggestion that her dishonest conduct had been repeated. The finding that she had not fully accepted her role, gained full insight into her actions and gravity of offences is said to be wholly unfair and against the evidence placed before the Panel. In the round it is said that it was not open to the Panel on the material before it to find that it was in the public interest to find impairment and the Panel had approached the question of impairment in a fashion which ignored the "test" which had to be applied in looking forward and not past.

37 I have considered carefully those submissions but there is no substance in them in my judgment. For the reasons I have already given the Panel were fully entitled to put such weight on the material factors going to impairment as they thought appropriate. They were entitled to have regard to the degree of seriousness of the offending as they found it to be by reference to the sentencing remarks of the judge in the Crown Court. This was serious offending and it is difficult to see how it can be said in this case that the conviction for deliberate dishonest actions in order to secure approximately £144,000 could not lead to a finding that the behaviour had seriously undermined the reputation of the profession. The Panel obviously did, by their reasoning, expressly take into account the professional performance of the appellant and took

into account expressly the evidence of the employer about his lack of concerns. Indeed, on the evidence there had been no repetition of such dishonesty, and there is the evidence as to the removal of the supervision in relation to money matters in her profession. However, it was for the Panel to decide what weight to be given to those factors set against not only the seriousness of the offending but the lack of insight which the appellant had shown into her actions and the gravity of her offences.

38 It was a combination of the two factors – the seriousness of the offending and the lack of insight – which clearly led the Panel ultimately to the decision it did on impairment. There is nothing in the evidence which I have already rehearsed which would justify a conclusion that the Panel were not entitled to reach the decision they did on the lack of insight. I have already rehearsed the evidence. In my judgment it was wholly justifiable to conclude the appellant had never accepted the essential elements of the offence of which she was found guilty, namely the element of dishonesty, that is to say the fact that she knowingly furnished false information to the building society, knowing of the falsity, including knowledge that the accounts were false. The evidence is compelling by reference to the matters to which I have already rehearsed, that the appellant has continued to seek to minimise and diminish the gravity of her offending. In those circumstances I can find nothing to suggest that the Panel approached their task at the stage of impairment in an improper way or came to a wrong conclusion when balancing the relevant factors.

39 The Panel were fully entitled, in my judgment, to find it was necessary to make the finding of impairment to reaffirm clear standards of professional conduct and to maintain public confidence in the practitioner and the profession.

Sanction

40 I turn then to sanction. As I have already indicated, this court will not readily interfere with a decision on sanction, if the Panel has weighed the relevant factors in a proper way and has followed the guidance on sanction set out in the *Indicative Guidance* of April 2008. It would only be if this court could say that the Panel reached a conclusion which was wholly unbalanced, or failed to have regard to proper factors or took into account irrelevant factors or came to a wholly disproportionate decision on sanction that the court could interfere.

41 The Panel had before it the *Indicative Guidance* . I rehearse the general principles set out in that sanction guidance. Paragraph four:

> “4 In considering what sanctions, (if any) to apply, a panel must have regard to both:
>
> • the public interest; and
>
> • the registrant's own interests.
>
> 5 The ‘public interest’ includes:
>
> • the protection of members of the public;
>
> • the maintenance of public confidence in the professions and the NMC; and
>
> • declaring and upholding proper standards of conduct and performance.
>
> 6 The sanction must demonstrate in each case a considered and proportionate balance between:
>
> • the interests of the public and the particular registrant; and
>
> • the mitigating and aggravating factors in the particular case.”

42 The S *anctions Guidance* indicated the range of sanctions available to the Panel and that the sanctions should be considered in the following order: to take no further action; to caution the registrant, to impose conditions with which the registrant must comply for a specified period; to suspend the individual's registration; to strike the individual off the register.

43 It is clear from its reasoning on sanction that the Panel did follow this process. The reasons are as follows:

> "The Panel again received the parties' submissions and accepted the advice of the Legal Assessor.
>
> The Panel had no further documentary or testimonial evidence placed before it at this stage in the proceedings.
>
> The Panel has been told by the Registrant that she is still in employment.
>
> The Panel noted it should not impose a sanction that would amount to a punishment however it acknowledged that sanction might have a punitive impact.
>
> The Registrant's representative put forward in mitigation the amount of time that had elapsed since these matters came to light and the impact that the suspended sentence had upon the Registrant including her inability to progress her professional career by way of promotion.
>
> The Panel noted that this matter had been brought to the NMC's attention by the Registrant, albeit at some later stage.
>
> The Panel had before it evidence that the Registrant had a number of dependent children. The Panel also noted that at the time that the mortgage fraud came to light the Registrant was a student nurse and had subsequently qualified.
>
> The Panel also noted that, as far as it knew, there were no subsequent or previous matters professional or personal that would bring the Registrant's practice or the profession's reputation into question.
>
> No further action: Given the gravity of the offences which the Registrant had been found guilty of, the Panel came to the conclusion that it was totally inappropriate in such circumstances to take no further action.
>
> Caution order: the Panel then considered the factors identified under the heading of caution order in the Indicative Sanctions Guidance issued by the NMC, with a view to assessing whether there was sufficient evidence that would support the imposition of this level of sanction. The Panel was able to identify the following mitigating factors. There had been no repetition of the behaviour and the offences did not involve the Registrant's professional conduct and, therefore, no patients were put at risk of harm.
>
> The Panel was also able to identify the following aggravating factors. There was no current information from the Registrant's current employer and no testimonials or references from friends, family or professional colleagues. There had been no early admission of guilt or apology for her behaviour. There had been little or no insight into the impact of her conduct. The Panel noted there were no appropriate rehabilitative steps that the Registrant could take to address her dishonest behaviour.
>
> The Panel therefore came to the conclusion that this level of sanction was not proportionate in all the circumstances of the case, moreover, it would not be sufficient to maintain the reputation of the professions.
>
> Conditions of practice order: this being a dishonesty conviction, the Panel came to the conclusion that a conditions of practice order was neither practicable nor workable as a sanction as it would not address or redress the Registrant's dishonest behaviour.
>
> Suspension order: the Panel, in considering whether to impose a suspension order had to decide whether the Registrant's actions were fundamentally incompatible with remaining on the register. The NMC had relied solely upon the reputational damage that

> this Registrant's actions had upon the profession. It was stated that the public interest was damaged by her dishonest behaviour. The Registrant had perpetrated a deliberate and very serious mortgage fraud and one which would have warranted a custodial sentence, save for the exceptional personal circumstances at the time of sentencing. The Panel had particular concerns about the Registrant's lack of remorse or insight into her actions and the Panel considers that this impacts significantly on her reputation and that of the professions. Moreover, the Registrant has continually attributed blame to others for her own fraudulent actions which included holding herself out as running a self-employed business, and relying upon fabricated accounts for that fraudulent business which was in an allied field of practice. The Panel was particularly concerned that the Registrant was still of the view that it was unfortunate that the CPS had made a decision to prosecute as she maintained the Halifax had not decided to take matters further.
>
> The Panel was told by the Registrant that she was at fault: at fault for not reading documents; at fault for not pleading guilty. The Registrant is still maintaining that her actions were limited to signing documentation and is clearly trivialising and minimising her actions. This is at variance with the statements made by the judge which showed that this was a sophisticated and well-planned fraud.
>
> The Panel consider that the Registrant has demonstrated an alarming lack of insight and remorse in this case. The Panel, therefore, came to the conclusion that the Registrant's actions were fundamentally at variance with remaining on the register.
>
> Striking off order: the Panel therefore came to the view that making a striking off order was both proportionate and appropriate in all the circumstances of this case and is the only level of sanction which would uphold the standing and status of the professions. The Panel therefore imposes this order on public interest grounds."

44 Again, notwithstanding the careful submissions made to me by Ms Maudsley, I can find no fault with the Panel's reasoning and the way they reached the professional judgment they did as to what was the proportionate and appropriate sanction necessary to uphold the standing and status of the profession.

45 The complaint is made that the Panel unfairly referred to the registrant's lack of remorse. Emphasis is placed on the fact that the appellant had referred herself to the NMC. However, as the respondent rightly submitted, the mere act of self-reference does not in itself necessarily indicate remorse and indeed, as I have indicated, the way in which the facts underlying the conviction were put to the NMC in the letter of 11 November 2008 does not demonstrate in my judgment the registrant's acceptance of the essential feature of her offending, namely the knowing and dishonest furnishing of false information in order to obtain a large sum of money. The remorse expressed by the registrant is more the remorse that she has been convicted and that she has to accept the conviction, and that because of the conviction she has found herself in the personal difficulties to which she referred in the course of her evidence. I need say no more than that which I have said already: the evidence in my judgment was compelling in support of the Panel's conclusion that the registrant had demonstrated "an alarming lack of insight and remorse".

46 Then it is said that the decision to order striking off was disproportionate in that the Panel failed to have any proper regard to the personal mitigation available to the appellant, in particular the circumstances rehearsed by the judge when finding exceptional circumstances for suspending the prison sentence. I can find no substance in that complaint. The Panel clearly did have regard to the personal circumstances of the appellant according to the material which had been laid before it. The Panel expressly referred to her having a number of dependent children. The Panel referred to the circumstance of the appellant being only a student nurse at the time of her offending; it referred to the lack of any evidence that the appellant had committed any further acts, professional or personal, which would bring her practice or the profession's reputation into question. The Panel expressly referred to the impact the suspended sentence had had upon the registrant, including her inability to progress her professional career by way of promotion and the amount of time which had elapsed since these matters had come to light.

47 I have already referred to the well-established principle that at this stage the Panel is

concerned with the reputation of the profession and not the punishment of the appellant. In these circumstances mitigation which would go to the issue of punishment has less weight. I can see nothing in the complaint about the way the Panel approached the available mitigation to the appellant. They were entitled to say that that mitigation was outweighed by the seriousness of the offending and the "alarming lack of insight and remorse".

48 Then it is said that the reasoning referable to the possibility of a caution order unfairly refers to the fact that there was no appropriate rehabilitative steps that the registration could take to address her dishonest behaviour. It is said that in fact the registrant could be taken to have remediated her dishonest behaviour. However, the only evidence of this was the fact that there had been to date no recurrence of the behaviour. There was, in fact, no evidence before the Panel that the appellant had taken any particular steps to address her dishonesty. The one feature in this case which emerges crystal clear is that the registrant has never acknowledged that she has been dishonest as such. I find nothing in this point.

49 There are two matters to which I consider the appellant is entitled to take legitimate objection in the reasoning of the Panel on sanction. However, I say at once that I do not regard that the errors of the Panel in this regard were such that they undermine their overall reasoning and professional judgment on sanction.

50 The first is that the Panel under the heading "Caution order" stated that there was no current information from the registrant's current employer and no testimonials or references from friends, family or professional colleagues. As a matter of fact these two statements were correct. The information relating to employment was that emanating from the evidence of Mr Cheng, but this was dated in April 2010, a good 12 months prior to the Panel's hearing. Secondly, as a matter of fact no testimonial references from friends, family or professional colleagues were before the Panel.

51 Those facts, however, merely meant, in my judgment, that there was no particular mitigating factor referable to those matters before the Panel. The Panel were wrong to regard them as aggravating factors. This is made clear in particular by the terms of the *Sanctions Guidance* itself where, under the heading "Guidance on Mitigation", it is stated at paragraph 30:

> "The absence of references or testimonials should not count against a registrant … "

52 Similarly I am prepared to accept that the Panel should not have placed emphasis on there having been no early admission of guilt meaning, it would appear, no early admission of guilty prior to the trial. For the present purposes I will accept the approach of the court in the case of Alhy v GMC [2011] EWHC 2277 that there may be very good reasons for maintaining innocence throughout the criminal process (see the judgment of HHJ Belcher sitting as a High Court judge at paragraph 47)

53 The reason, however, that I do not regard these errors as undermining the overall conclusions on sanction is that they do not in themselves, in my judgment, have such significance as to outweigh the factors clearly identified by the Panel leading to these conclusions, namely the seriousness of the offending and the alarming lack of insight into and remorse shown for the dishonesty committed by the appellant. What has more significance than the failure to plead guilty before trial is the behaviour of the registrant after trial and after he or she has been found guilty. As the judge said in Alhy at paragraph 47:

> "He is, of course, entitled to maintain his innocence after the criminal proceedings are concluded. But by doing so, it is inevitable that it will follow that he is not prepared to accept the matters found against him or to take any appropriate action in relation to them, or to consider the risks which might arise from them as to the future. Those are matters which it is plain the General Medical Council Fitness to Practise Panel took into account. It is quite clearly set out in their reasoning and is something they took into account when considering sanctions, and properly so."

54 In this case, not only was there no admission of guilt before trial, but there has in my judgment been no acknowledgement of guilt post-conviction as regards the essential element of dishonesty

in the offending. This is a matter which cannot be ignored. In my judgment the Panel were fully justified in their conclusion having weighed all the factors in the balance on sanction, that the seriousness of the offending and the lack of insight and remorse were the two features which ultimately led to the professional judgment they made.

55 For all these reasons I am quite unable to interfere with the professional judgment of the Panel on sanction. It has not been demonstrated to me that they made any error of law in their approach, or that they failed to take into account proper considerations or that they did not ultimately come to a proportionate conclusion.

56 I should refer to proportionality in the particular context of Article 8 of the European Convention . This has been relied on as a separate ground of appeal in relation to sanction but Ms Maudsley properly conceded that it did no more, and the jurisprudence upon it did no more, than to emphasise the need for the Panel to be aware from the outset when considering sanction that they had to reach a decision which was proportionate and which balanced the interests of the registrant as against the interests of the public. This is, in effect, the substance of the observations in the case of *Salsbury [2008] EWCA Civ 1285* to which I was referred:

> "In applying the Bolton principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the Convention. It is now an overstatement to say that "a very strong case" is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal."

Also the observations in Madan v GMC [2001] EWHC 577 at paragraph 69:

> "But the staggered review will come to nought or to nearly nought if the right to practise is not elevated to the status of a civil right requiring any interference to be proportional."

57 The Panel patently referred to proportionality. The Panel had before them the *Sanctions Guidance* which drew the appropriate approach to their attention. The Panel clearly considered their decision was proportionate and this was a decision to which they were entitled to come. This was ultimately a professional assessment by the Panel. There is nothing to suggest, in my judgment, that they were not fully aware of what the interests of the registrant were. The impact upon her of a striking off as regards the loss of her career and the potential it might have for putting her in financial as well as reputational difficulties would be self evident.

58 For all these reasons, notwithstanding, I repeat, the careful submissions made to me, this appeal must be dismissed.

MR PATAKY: My Lord, there is a matter of costs in this case. Has your Lordship seen a copy of the schedule?

MR JUSTICE KING: The sensible thing is for me to hear the submissions on behalf of the appellant.

MS MAUDSLEY: My Lord, the appellant is in receipt of public funding therefore I would ask for her legal aid costs to be assessed in the usual way.

MR JUSTICE KING: What about the application for costs made against you?

MS MAUDSLEY: We have no comment on that. We have no objection to it.

MR JUSTICE KING: Someone has to bring me up to date on the principles. Is the fact that the appellant is in receipt of public funding herself anything to do with my decision as to whether to make an order?

MS MAUDSLEY: No.

MR JUSTICE KING: In the old days when one party was legally aided and the successful party on the other side asked for costs, the normal order was to make the order for costs against the unsuccessful party but not to be enforced without leave of the court. That was by reference to particular regulations, particular statutory provisions. Do they still hold?

MR PATAKY: I am sorry, I cannot assist.

MR JUSTICE KING: Mr Pataky, do you object to an order for costs but not to be enforced without leave of the court as a matter of principle? Ms Maudsley, what is the legal position?

MS MAUDSLEY: As far as I am aware, because the appellant is publicly funded, then there is no costs schedule on behalf of the appellant because she has legal funding.

MR JUSTICE KING: That is not the issue at all. In principle the respondent is entitled to costs against your client. Do I have a discretion to say "Yes, you can have the costs but not to be enforced without leave of the court?" And if so, by reference to what statutory provisions? I think what I am going to do, because of the lateness of the hour, is that I am going to ask that each party puts in writing their submissions on costs and I will make a decision on the papers unless anybody has any objection to that course. If anybody has any objections as to the principle of costs they should say so and why. If anybody has any observations to make about whether or not an order can be made against the appellant but not to be enforced without leave of the court it should be stated why. If anybody has any observations about the quantum of costs and objections they should indicate. I suspect you will get some aid from your instructing solicitors.

MR PATAKY: Thank you.

MS MAUDSLEY: I am obliged, thank you.

MR JUSTICE KING: Thank you all very much.