# O v Nursing and Midwifery Council

Case No: CO/831/2015

High Court of Justice Queen's Bench Division Administrative Court

22 October 2015

**[2015] EWHC 2949 (Admin)**

**2015 WL 6150677**

Before: The Honourable Mr Justice Kerr

Date: 22/10/2015

Hearing date: 13 October 2015

## Representation

Penny Maudsley (instructed by Lester Morrill ) for the Appellant.

Nisha Dutt (instructed by The Nursing and Midwifery Council ) for the Respondent.

## Approved Judgment

Mr Justice Kerr:

1 An anonymity order has been made in this case. Neither the appellant, Mrs O, nor her husband or any of her children must be identified, nor must any document be published which might directly or indirectly identify her or her husband or any of her children.

2 Mrs O came to this country in 2007 to work. Later, from about 2010, she worked for the National Health Service (NHS). She is a qualified nurse. She had a work permit and obtained employment with the NHS as a nurse.

3 She settled in this country with her husband and three young children. When the children behaved badly she would use corporal punishment on them. Her husband did the same, to two of the three children.

4 Mrs O would beat the children as a punishment for bad conduct such as not doing their homework. She would use a cane or stick, or a wire coat hanger. She did not understand that this was wrong and illegal in this county.

5 Her experience of living in Nigeria was that it was acceptable and accepted as a form of punishment. So it was in this country, until a couple of generations ago. Now, while a light slap to a child to enforce good behaviour, causing no injury, is still not illegal, beating with a stick, cane or coat hanger certainly is.

6 Mrs O did not mean harm to her children. There was no evidence of injury to them but they suffered pain when beaten and eventually one complained about it at school. This led to an investigation and the arrest of Mrs O. When asked about the allegations in interview, she falsely denied them.

7 In November 2012, the children were taken into care and, subsequently, placed with foster parents. Mrs O and her husband were charged with counts of assaulting or ill-treating a child, contrary to section 1(1) of the Children and Young Persons Act 1933 . Both pleaded not guilty.

They were represented by the same counsel.

8 From April to June 2013, Mrs O attended a parenting course while separated from her children. A parenting assessment in January 2014 was positive, and concluded that Mrs and Mr O had been able to demonstrate the parenting skills and tools they had learnt and were able to put them into practice and sustain them over time. The conclusion was that the children would not be at significant risk if returned to their parents.

9 In March 2014, Mrs O was convicted on all three counts by the jury. Mr O, her husband, was convicted on two counts. Both were sent to prison for 36 weeks. In his sentencing remarks on 9 May 2014, His Honour Judge Seed QC noted that they had pleaded not guilty, as they were entitled to do, but that this had meant their children had had to give evidence against them.

10 He also noted that their defence had been that the children were lying and this had therefore been put to the children by their counsel in cross-examination. The judge also noted in his sentencing remarks that Mrs O had continued to deny responsibility for the offences even after being convicted of them, when speaking to a probation officer for the purpose of a pre-sentence report.

11 Mrs O's later explanation of why she had pleaded not guilty was that she had not understood that she was doing wrong, as striking children was acceptable practice in Nigeria where she came from, and she had not appreciated that beating them would cause them physical or emotional harm.

12 After Mrs O's conviction, the matter was referred to the respondent, the NMC, which is the body responsible for professional regulation and discipline of nurses and midwives. A case investigation officer was appointed and a disciplinary case against her was opened.

13 While in prison on 11 July 2014, Mrs O wrote a handwritten “reflective statement”. In it she said she now accepted she had been wrong to plead not guilty and wished to accept responsibility for the impact of her actions.

14 She explained that she had done the parenting course the previous year and had shown her skills in contact sessions with the children. She apologised for what she had done, said she had learnt her lesson and that it would not happen again. She said she had acted out of ignorance and was influenced by her Nigerian background.

15 There were proceedings in the Family Court during this time. When Mrs O came out of prison she began carrying out research on parenting and the skills needed to be a good parent, including avoidance of physical punishment. She kept a written log from 20 September 2014 to January 2015. She typed a note dated 17 January 2015, documenting her research, her aspirations for her children, what she had read and acceptable disciplinary strategies.

16 She concluded that typed note with an apology for her actions towards her children and the image of the nursing profession, promising it would not happen again. She said she had apologised to her children, and she apologised to the public. She had erred and took full responsibility. That last written apology may have been, by oversight, omitted from the papers at the subsequent hearing which led to the decision now appealed against.

17 In late 2014 and early 2015, Mrs O obtained fulsome testimonials in writing from a friend and from professional colleagues, testifying to her professionalism and integrity. There have never been any clinical concerns about her performance as a nurse, which she has been for some 16 years in Nigeria and this country.

18 In her typed note of 17 January 2015, Mrs O expressed determination to be a good parent in future, as well as contrition and remorse about the wrongdoing that had led to her conviction and sentence. She noted that in the Family Court proceedings, progress was being made towards the children being “rehabilitated back into my care”. Contact sessions with the children were taking place at the time.

19 Mrs O was charged by the NMC with having been convicted, on 18 March 2014, of the three counts of assault, ill treatment, neglect or abandonment of a child likely to cause unnecessary suffering and injury, contrary to section 1(1) of the Children and Young Persons Act 1933 . It was alleged that in the light of that conviction, her fitness to practise as a nurse was impaired. A hearing date was set for 21 January 2015.

20 The day before the hearing, an email from Mrs O's solicitor in the Family Court proceedings was sent, and was available to the Conduct and Competence Committee ("the committee") at the hearing on 21 January 2015, together with other documents including Mrs O's handwritten and typed notes, and her log setting out the research she had done.

21 The solicitor's detailed account in her email included confirmation that the Family Court proceedings were moving cautiously in the direction of reunification of the family, and included reference to a social worker's note dated 12 January 2014 (before her conviction and sentence) that she was then "very contrite accepting her past behaviours unacceptable".

22 At the hearing before the committee, Mrs O was represented by counsel, Mr Hockley. The NMC was represented by Mr Vallance. The committee was assisted by a legal assessor, Mr Mitchell. Mr Hockley explained that Mrs O admitted the charge and admitted that her fitness to practise is currently impaired by reason of her conviction, on the basis of public interest.

23 The legal assessor clarified that the judge had sentenced Mrs O on the basis of the "assault limb" of section 1 of the Children and Young Persons Act 1933 . Mr Hockley went onto explain that he intended to make submissions "regarding what level of insight and remediation may have taken place". He did so by reference to the documents I have mentioned.

24 Mr Vallance cautioned the committee against accepting the "reflective documents", as he put it, "at face value". He pointed out that she had denied the offences even after conviction, prior to sentence.

25 Mr Hockley made his submissions, though not by way of opposing the proposition that Mrs O's fitness to practise was impaired. He emphasised that there were no professional or clinical concerns about Mrs O's performance and no danger to the public. He emphasised Mrs O's genuine remorse and contrition, and the remediation work she had undertaken.

26 The committee found that her fitness to practise was indeed impaired. The failure to obey the laws of the country in which she was practising was serious and her conduct was a "breach of a fundamental tenet of the nursing profession".

27 The committee went on to find that her conduct had "fallen far short of the standards expected of an experienced registered nurse"; and that "were a finding of impairment not made, public confidence in the profession would be undermined as would the reputation of the nursing profession".

28 After a break, the committee went on to consider the question of sanction. Before hearing from Mr Vallance, Mr Hockley stated that he did not wish to call Mrs O to give evidence but she made a short verbal statement reiterating her apology for parenting her children in the way that she had done, stating that she loved them and had good intentions for them, that she had learned her lesson, that "this will never happen again" and that she was "sorry for disgracing the nursing profession and the public and I take full responsibility for that".

29 Mr Vallance then addressed the committee on the principles relevant to sanction which had emerged from cases such as *Bolton v. The Law Society [1994] 1 WLR 512, [1994] EWCA Civ 32* . I need not dwell on that account, since no criticism is levelled at the contents of those submissions, nor with any legal advice given by the legal assessor.

30 Mr Hockley then made submissions in mitigation. He referred to the Indicative Sanctions Guidance ("the Guidance"). An equivalent document produced by the General Medical Council was described thus by Collins J in Council for the Regulation of Healthcare Professionals v. the General Medical Council and Dr Anthony Leeper [2004] EWHC 1850 (Admin) , at para 24:

> The GMC's Indicative Sanctions Guidance for the Professional Conduct Committee is equivalent to a sentencing guide. It helps to achieve a consistent approach to the imposition of penalties where serious professional misconduct is established. The PCC must have regard to it although each case will depend on its own facts and guidance is what it says and must not be regarded as laying down a rigid tariff…

31 The Guidance in this case includes reference to the NMC's statutory purpose of safeguarding the health and well-being of persons using or needing the services of registrants, and its function

of establishing standards of education, training, conduct and performance. It also explains (at paragraph 17) that the purpose of sanctions is not punitive but to protect the public interest.

32 The Guidance further states (at paragraph 20) that panels must act “proportionately” as a result of article 8 of the European Convention on Human Rights , and that this involves (paragraph 19) “balancing the interests of the public against those of the registrant”.

33 It goes on to explain (paragraph 24) that all aspects of mitigation should be considered against the backdrop of the fundamental aim of public protection and the declaring and upholding of professional standards and the maintenance of public confidence in the professions and the regulator.

34 At paragraph 25, the Guidance explains that mitigation is considered in three categories which are, broadly, evidence of insight and understanding and attempts to address the problem; evidence of observance of the principles of good practice; and personal mitigation such as stress or illness or other hardship. At paragraph 26, it is pointed out that the latter carries less weight in regulatory proceedings as it must be balanced against the public interest.

35 In relation to criminal convictions, the Guidance notes (at paragraph 50) the point made by Sir Thomas Bingham MR in Bolton v. Law Society that in criminal cases:—

> The seriousness of the criminal offence, as measured by the sentence imposed by the Crown Court, is not necessarily a reliable guide to its gravity in terms of maintaining public confidence in the profession.

36 The Guidance goes on to invite panel members to consider the full range of sanctions open to them, in ascending order of gravity. In the present case, it is common ground that the relevant ones are a suspension order or a striking-off order. Paragraph 70 requires a panel, when considering seriousness, to:

> take into account the extent of the departure from the standards to be expected and the risk of harm to the public interest caused by that departure, along with any particular factors it considers relevant on each case.

37 In relation to suspension, paragraph 71 sets out a non-exhaustive list of factors indicating that suspension may be appropriate. They include the following, so far as relevant to this case:

> 71.1 A single instance of misconduct but where a lesser sanction is not sufficient.
>
> 71.2 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.
>
> 71.3 No evidence of harmful deep-seated personality or attitudinal problems.
>
> 71.4 No evidence of repetition of behaviour since the incident.
>
> 71.5 The panel is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.

38 Where a striking-off order is made, the effect is that a struck-off nurse or midwife may not apply for restoration to the register until five years has passed since the striking-off order was made. Under paragraphs 74 and 75 a list of “key considerations” is set out. So far as relevant they are as follows:—

> 74.1 Is striking-off the only sanction which will be sufficient to protect the public interest?
>
> 74.2 Is the seriousness of the case incompatible with ongoing registration (see paragraph 70 above for the factors to take into account when considering seriousness)?

74.3 Can public confidence in the professions and the NMC be sustained if the nurse or midwife is not removed from the register?

75 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 (this list is not exhaustive):

75.1 Serious departure from the relevant professional standards as set out in key standards, guidance and advice including (but not limited to):

75.1.1 The code: Standards of conduct, performance and ethics for nurses and midwives

…

75.5 Any violent conduct, whether towards members of the public or patients, where the conduct is such that the public interest can only be satisfied by removal

…

75.8 Convictions or cautions involving any of the conduct or behaviour set out above.

39 The reference in paragraph 75.1.1 to the "code" is a reference to the NMC's code entitled *Standards of Conduct, Performance and Ethics for Nurses and Midwives* . The committee had already found, at the stage of considering impairment of fitness to practise, that Mrs O had breached her obligations under the code to "be open and honest, act with integrity and uphold the reputation of your profession"; to "act lawfully whether those laws relate to your professional practice or personal life"; to "adhere to the laws of the country in which you are practising" and to "uphold the reputation of your profession at all times".

40 Mr Hockley made his submissions in relation to sanction, arguing in favour of suspension rather than striking-off. He pointed out that the offences did not involve patients and that there were no concerns about Mrs's O treatment of patients. He submitted that para 71.3 of the Guidance was applicable (no evidence of harmful deep-seated personality or attitudinal problems).

41 He also relied on para 71.4 (no evidence or repetition of behaviour since the incident). He invited the committee to be satisfied under para 71.5 that Mrs O had "insight and does not pose a significant risk of repeating behaviour". He pointed to the differences between "cultural norms" in Mrs O's country of origin and in this country, and said her contrition was real and deep.

42 He argued that these factors had to be balanced against the public interest in the upholding of standards and maintaining confidence in the nursing professions and the regulator. He suggested that (as in the case of *Royal College of Veterinary Surgeons v. Samuel [2014] UKPC 13* ) if the public knew all the circumstances, including the mitigating circumstances, a member of the public would not regard suspension as too lenient.

43 In relation to possible striking-off, Mr Hockley submitted that this was not a case falling within paragraph 75.5 of the Guidance where the violent conduct of Mrs O had been such that the public interest could only be satisfied by her removal from the profession. He pointed to Mrs O's unblemished record in the profession and the public interest in "having good nurses continue to work".

44 The legal assessor advised, in relation to sanction, that the committee would need to apply its mind to aggravating and mitigating features. In relation to the latter, they would:

include (but would not be limited to): evidence of Mrs [O]'s insight; her understanding of matters that caused her fitness to practise to be impaired, and any steps that she may have taken to remediate or redress those issues. Also take into account apologies and expressions of regret. Further, and finally, take into account what you have heard about her own personal circumstances ….

45 The committee then adjourned to consider the matter and returned to give its decision, which was that Mrs O should be struck off the register. In its decision on sanction, the committee noted Mrs O's contrition and apology and that she had said that she would not repeat her behaviour and had learnt her lesson.

46 The committee then recorded in its written determination the submissions of, respectively, Mr Vallance who, in effect, advocated striking-off (though without saying so directly), and Mr Hockley, who argued for suspension.

47 In recording Mr Hockley's submissions, the committee in its written determination referred to his reliance on two of the passages in the guidance quoted above, referring to, first, the absence of any harmful, deep-seated or attitudinal problems; and, secondly, the absence of any likelihood of repetition of the offending behaviour. The committee noted Mr Hockely's submission that Mrs O had demonstrated insight into her actions.

48 The committee recorded Mr Hockley's other submissions which, it noted, added up to the proposition that (taking all considerations into account), “your conviction is not fundamentally incompatible with you being a registered nurse”. The committee set out the requirement of “proportionality, weighing the interest of patients and the public against your own interests”.

49 The decision then addressed in bullet point form the mitigating factors, which were said to “include”: insight and remorse, development of parenting skills, an otherwise unblemished nursing career and previous good character. The committee set out five aggravating factors: the conviction on three counts of assault on her children; the vulnerability of the children by virtue of their age; abuse of a position of trust as their mother; the period during which the conduct had occurred; and her failure to admit to the offences causing the children to have to give evidence against her in court.

50 The last point was open to question since Mr O had likewise pleaded not guilty to the charges against him and had run the same defence, which meant that unless he had changed his plea, the children would (unless the case against him were dropped) have had to give evidence against one parent anyway, albeit not against both parents. But that was not a point taken at the time by Mr Hockley.

51 The committee then proceeded to consider the available sanctions in ascending order of gravity, as recommended in the Guidance. Having ruled out less serious sanctions, it went on to consider a suspension order. The committee stated that it:

> had careful regard to the [Guidance] and in particular the factors identified in paragraph 71 of that document. It was of the view that paragraph 71.2 was a particular consideration in this case…

52 The committee then set out paragraph 71.2 verbatim and proceeded to state as follows:

> The panel considered that the conviction in this case was serious in that you assaulted your own children over a period of time, who were vulnerable and who trusted you as their mother. It considered that such actions are incompatible with remaining on the register. In all the circumstances, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

53 The committee went on in its written decision to consider a striking-off order, which occupied the whole of the last page of its determination. It had already ruled out every other available sanction. Nonetheless, the written decision went through the steps set out in the Guidance at paragraphs 75.1, 75.1.1, 75.5, 75.8 and 76. It then stated that it “gave due regard to the mitigating factors in this case”. The conclusion was then set out that nothing less than striking-off would be sufficient.

54 The committee went on to impose an interim suspension order prohibiting practice pending the determination of any appeal. There is no appeal against that interim order.

55 Those, then, are the facts up to and including the decision of the committee. Mrs O appealed

on 20 February 2015. After that, an independent social worker prepared a report dated 23 February 2015 recommending that the children should be reunited with their parents.

56 The report included the comments that “there was no cruel or ill intent, rather they [Mrs and Mr O] repeated without question what they had either experienced or observed during their years in their country of origin”; and “the risk of future physical harm to the children I believe is minimal”. In the same report the social worker stated that he or she “had no concerns for the children's well-being in their parents' care”.

57 In the Family Court proceedings on 7 May 2015, Her Honour Judge Purkiss made an order endorsing the proposition that the children should be returned to the full time care of Mr and Mrs O from 10 May 2015, subject to a regime of continuing supervision.

58 Mrs O applied for permission to rely on the documents just mentioned, which came into existence after the committee gave its decision in January 2015. The NMC did not oppose that application, while pointing out that the subsequent documents would necessarily be of very limited assistance, if any, given that they had not been before the committee at the time of its decision.

59 In her appeal, Mrs O, through Ms Maudsley, advances three grounds;

(1) The committee wrongly placed weight on Mrs O having denied the criminal charges.

(2) The reasoning as to why a striking-off order was imposed, was inadequate.

(3) The sanction of striking-off was disproportionate in all the circumstances.

60 In an appeal such as this, the court may dismiss the appeal, may allow it and quash the decision, may substitute any decision the committee could have made, or may remit the case back to the committee; see article 38 of the Nursing and Midwifery Order 2001 (SI 2002/253).CPR 52.10(2) slightly expands those powers, but not materially for present purposes.

61 By CPR 52.11(3) , I am required to allow the appeal if the decision below was either wrong, or unjust because of a serious procedural or other irregularity. There was no dispute before me about the correct approach for me to adopt in an appeal such as this from a professional disciplinary body.

62 I was referred to well known authority dealing with the appropriate degree of deference to the decision appealed against, which depends on what is warranted by the circumstances but is usually considerable because of the respect to which the professional judgement of those experienced in the profession is normally entitled: see *Raschid v. General Medical Council [2007] 1 WLR 1460, [2007] EWCA Civ 46* , per Laws LJ at paragraphs 18-20 (and the citations from other authorities therein); and Azzam v. General Medical Council [2208] EWHC 2711 (Admin) , per McCombe J (as he then was) as paragraph 25.

63 Ms Maudsley, for Mrs O, submitted, first, that the committee's decision was flawed by placing too much weight on Mrs O's pleas of not guilty to the three charges. She submitted that to contest a criminal charge is a fundamental right of a defendant and there may be good reasons for doing so even where a conviction later ensues. This was recognised at paragraph 52 of King J's judgment in *Ige v. Nursing and Midwifery Council [2011] EWHC 3721 (Admin)* .

64 It is true that, whereas a guilty plea is a mitigating feature in a criminal trial, a not guilty plea is not an aggravating feature of itself. Despite that, I do not think there is merit in this ground of the appeal. As Ms Dutt, for the NMC, pointed out, the aggravating feature in this case is not the guilty plea itself, but the consequence that the children were required to give evidence against their own parents.

65 As I have already observed, that might have happened even if Mrs O had pleaded guilty, unless Mr O had done so as well. Nevertheless, the sentencing judge and the committee alike were, in my judgment, entitled to take the view that the manner in which the parents' defence was conducted was an aggravating factor. It also counterbalances to some extent the quality of Mrs O's contrition and acceptance of responsibility, genuine though these are. A similar point was made in paragraph 53 of King J's judgment in Ige , where undue emphasis on a guilty plea did not avail the appellant.

66 In the second ground of the appeal, Ms Maudsley submits that the committee's decision is inadequately reasoned. Her submission is not just that the decision fails to include sufficient reasons to enable Mrs O to understand why the committee reached its decision (see *English v. Emery Reinbold & Strick Limited [2002] EWCA Civ 605* per Lord Phillips MR at paragraph 19).

67 Ms Maudsley's contention goes further: that there is an unacceptable paucity of reasoning, not merely of reasons. In particular, she criticises the committee for failing in its decision to engage with and evaluate (as distinct from merely setting out) the factors relied upon by Mrs O's counsel, Mr Hockley, in mitigation.

68 Ms Maudsley said the committee failed properly to consider the following features of the mitigation: the cultural factor, namely the acceptability of corporal punishment for children in Nigeria; the absence of intent to harm; the children's wish to return to their parents; the detailed account of the solicitor in the family proceedings; the training undergone by Mrs O and the records she kept of her research; and the positive testimonials from professional colleagues.

69 As a result of its failure properly to evaluate the mitigation advanced on Mrs O's behalf, Ms Maudsley submitted, the committee had imposed a sanction that was disproportionate in all the circumstances. This was the third ground of the appeal. In particular, she said the committee had attached too much weight to the apprehended public perception of the convictions, which might very well be different from expected if a member of the public were aware of all the circumstances of the case.

70 Ms Maudsley submitted that the committee had failed to balance the public interest against that of Mrs O, and had imposed a sanction greater than necessary to satisfy the public interest in safeguarding the reputation of the nursing profession and the regulator, and had disregarded material considerations mitigating the severity of the disciplinary offences.

71 Ms Dutt submitted that the committee's reasoning was adequate. It was clear that the committee was aware of the mitigating features, which were referred to in its decision. The decision itself included reference to the balancing exercise having been carried out, and all the circumstances having been taken into account by the committee in reaching its decision.

72 Both parties referred me to the decision Ouseley J in *Brennan v. Health Professions Council [2011] EWHC 41 (Admin)* . A physiotherapist at a rugby club had assisted in faking injury to a player and maintained the deception over a considerable period of time. A disciplinary panel decided that only a striking-off order would be sufficient to meet the case. It commented in its decision that a suspension order would not be appropriate “because the past behaviour necessarily presents a risk of repetition in circumstances where Mr Brennan's personal interests conflict with his professional obligations.”

73 Ouesley J remitted the matter back to the disciplinary body, accepting the submission that the decision did not deal adequately with the case for the physiotherapist against striking-off. The judge commented that he did not know from the decision why the disciplinary panel thought there was a risk of repetition of the offending behaviour.

74 Ms Maudsley submitted that the position was the same here. Ms Dutt, by contrast, submitted that the case was quite different because in Brennan there was no stated basis for apprehending a risk of repetition of the offending behaviour (see paragraphs 45-47 in Ouseley J's judgment).

75 I turn to consider my reasoning and conclusions in relation to the second and third grounds of the appeal. In my judgment, it is clear that the committee fell into error in the way it approached its decision on sanction. In its written decision, the committee recorded the submissions in mitigation, but did not properly evaluate them.

76 The mitigating factors were stated to “include” the four matters set out as bullet points in its

decision. The list appeared not to be exhaustive but was not further developed. When going on to consider the appropriate sanction, the committee then applied the recognised technique, provided for in the Guidance, of considering available sanctions in ascending order of gravity.

77 There is nothing wrong in principle with that technique, provided it is undertaken in the right way. But where there are only two possible candidates for the appropriate sanction, namely suspension or striking-off, it is critical that all the available mitigation is considered at the stage of considering suspension, as well as when considering striking-off.

78 In the present case, the committee's decision indicates very strongly that it ruled out suspension as a possible sanction before it had carried out any proper evaluation of Mrs O's mitigation. Once suspension had been rejected, striking-off was the only sanction left available. That meant the whole of the last page of the reasons was, effectively, redundant except to confirm what had already been decided, namely that striking-off was the only appropriate sanction.

79 The operative part of the committee's reasoning is the part in which it ruled out suspension, since that was the exercise which determined that striking-off would necessarily follow. During that part of the committee's reasoning process, there was no evaluation worth the name of the points made in mitigation by Mr Hockley.

80 The error in this approach is contributed to by the way in which the Guidance is drafted. In paragraph 71, the “key considerations” in a suspension case include that set out at 71.2, which in effect asks the question whether suspension is too lenient. That consideration is, in appearance, given equal weight with the other considerations set out in 71.1 and 71.3–7 inclusive.

81 However, what is set out at 71.2 is, properly appreciated, not a “consideration” at all but the conclusion which either does, or does not, flow from an assessment of the other considerations set out under paragraph 71. Once paragraph 71.2 is found to be inapplicable, the inexorable conclusion is that suspension is too lenient and striking-off necessarily follows.

82 It is therefore critical to the fairness of the process that the paragraph 71.2 issue is addressed at the end of the committee's deliberations, not in the middle of them as was done in this case. Here, the committee proceeded straight to paragraph 71.2 when considering suspension, saying it was “of the view that paragraph 71.2 was a particular consideration in this case”.

83 That was the first statement it made when considering suspension as a possible sanction. There was no mention of the factors set out in 71.3 or 71.4, so heavily relied upon by Mr Hockley. When considering the paragraph 71.2 issue, the committee simply failed to address the mitigation advanced by Mr Hockley which should have informed its conclusion on that very issue.

84 Once the committee had concluded that suspension was insufficient, the case was effectively over. No other sanction remained available except striking-off. All others had been ruled out. Thereafter, there was still no evaluation of the points made in mitigation on Mrs O's behalf. They were never properly weighed in the balance against the public interest in maintaining trust in the nursing profession and the regulator.

85 For that reason, I am satisfied that the reasoning of the committee was defective and flawed, and that its decision was wrong and cannot stand. I therefore find that the second ground of Mrs O's appeal is well founded. It does not follow necessarily that the third ground of the appeal is also well founded, namely that the sanction of striking-off was disproportionate. That is a matter for the judgment of the disciplinary body applying itself to its task correctly.

86 Like Ouseley J in Brennan , I am not prepared to accept the invitation to determine the appropriate sanction myself. It seems to me that the right course is to remit the matter back to the committee for the matter to be determined, taking into account the manner in which it should properly approach its task as set out in this judgment.

87 I can see no reason why the committee, when reconsidering the matter, should not have the benefit of the most up to date evidence before it, including that which came into existence after the decision of the committee at issue in this appeal. The committee will no doubt consider carefully the fact that the family has been reunited and that Mrs O is (subject to supervision) trusted with the care of her children.

88 I invite the parties to submit an agreed draft order for the approval of the court. The question

remains whether the remission should be to the committee constituted as before, or to a freshly constituted committee. If that is not a matter that is agreed, I propose to hear brief submissions on the point from counsel, either orally or, if preferred in order to save costs, in writing.

89 The parties are asked to submit a draft order which is agreed as far as possible, and to liaise with each other and my clerk about any further submissions on any outstanding matters (including costs) that are not agreed. I am grateful to both counsel for their helpful written and oral submissions.