Neutral Citation Number: [2017] EWCA Civ 1344

Case No: B2/2015/2205

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SUNDERLAND COUNTY COURT
HH JUDGE FREEDMAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/09/2017

Before :

SIR TERENCE ETHERTON, MR
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between:

LISA DOHERTY	**Appellant**
- and -	
THE NURSING AND MIDWIFERY COUNCIL	**Respondent**

- -
- -

Mr Tom Kark QC and **Mr Justin Meiland** (instructed by **the Royal College of Nursing Legal Department**) for the **Appellant**
Ms Fenella Morris QC and **Ms Alexis Hearnden** (instructed by **the Nursing and Midwifery Council Legal Department**) for the **Respondent**

Hearing date: 11 May 2017
Further written submissions: 20 & 21 June 2017

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. The essential background to this appeal can be summarised as follows:

   (1) The Appellant is a nurse. She was first registered with the Nursing and Midwifery Council ("the Council") in 1992.

   (2) Nurses are required to renew their registration every three years, at which point they must satisfy the Registrar that they continue to meet the prescribed requirements to be entitled to practise as a nurse. Among those requirements is that they are of good character.

   (3) On 27 February 2013 the Appellant was convicted of a drink-driving offence (her second in five years). She was due to have to renew her registration in the autumn. When she applied to do so she disclosed the offence. The Registrar decided that because of her conviction she did not satisfy the good character requirements and refused to renew her registration.

   (4) The Appellant appealed to a Registration Appeal Panel, which upheld the decision of the Registrar. She pursued a further appeal to the County Court. By a judgment handed down on 19 June 2015 HHJ Freedman dismissed her appeal. She now appeals to this Court.

2. The Appellant's case on the appeal is two-fold. First, she says that the Registration Appeal Panel took the wrong approach. It should have applied the same standard as if her conviction had come before a "fitness to practise" panel as a disciplinary matter[1], and it should only have refused renewal if such a panel would have decided that she should be struck off. Secondly, she says that in any event, whatever approach was or should have been taken, her conviction did not justify refusing to renew her registration.

3. The Appellant has been represented before us by Mr Tom Kark QC, leading Mr Justin Meiland. Mr Meiland appeared for the Appellant both before the Panel and in the County Court. The Council has been represented by Ms Fenella Morris QC leading Ms Alexis Hearnden, neither of whom appeared below.

4. I will consider separately the two issues identified in paragraph 2 above, but I should begin by setting out the legislative provisions governing, on the one hand, registration and renewal, and, on the other, disciplinary striking-off, together with the guidance issued by the Council about the operation of those provisions.

5. When this judgment was in preparation it became clear that the versions of the relevant legislation in the bundle were not those in force at the material time. The parties were asked to provide the correct versions and also to deal in further written submissions with some questions raised by the Court arising out of the terms of the legislation.

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[1] The Council's fitness to practise rules are not described in the legislation itself as "disciplinary", but that is a convenient shorthand, which I will sometimes use in this judgment.

THE RELEVANT LEGISLATIVE PROVISIONS AND GUIDANCE

6. The legislative framework is contained in three instruments, the Nursing and Midwifery Order of Council 2001 ("the 2001 Order"); the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules Order of Council 2004 ("the Registration Rules"); and the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 ("the Fitness to Practise Rules"). I will deal separately with how they provide for initial registration and renewal and for the procedures governing fitness to practise. I will quote from the legislation as it was at the material time. It has since changed in various respects, though the parties are agreed that the differences do not affect the issues before us.

REGISTRATION AND RENEWAL

The Orders

Registration

7. Article 5 (1) of the 2001 Order – which falls under Part III ("Registration") – requires the Council to maintain a register of qualified nurses and midwives. Article 5 (2) reads as follows:

> "The Council shall from time to time –
>
> (a) establish the standards of proficiency necessary to be admitted to the different parts of the register being the standards it considers necessary for safe and effective practice under that part of the register; and
>
> (b) prescribe the requirements to be met as to the evidence of good health and good character in order to satisfy the Registrar that an applicant is capable of safe and effective practice as a nurse or midwife."

It is important to note the differences in the references to "safe and effective practice" as between elements (a) and (b) in article 5 (2) of the 2001 Order. Element (a) is concerned with the proficiency necessary for safe and effective practice. Element (b) is concerned with two characteristics which are regarded as affecting whether a nurse[2] is "capable of" safe and effective practice, namely good health and good character.

8. The Council has prescribed requirements in accordance with article 5 (2) which are embodied in rules 5 and 6 of the Registration Rules. Rule 5 (1) (a) requires an applicant to include a declaration of good health and good character and (by reference to Schedule 3) details of any criminal convictions. Rule 6 requires the lodging of a supporting declaration of good health and good character from an independent third party. Rule 6 (6) requires the Registrar, for the purpose of satisfying herself as to the applicant's good character, to have regard, *inter alia*, to the applicant's declaration, the supporting declaration and any criminal convictions.

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[2] Although the Order and the rules made under it apply identically to both nurses and midwives I will in this judgment refer simply to nurses.

9. Article 9 (1) of the 2001 Order requires a person seeking admission to the register to apply to the Council and provides that if she satisfies the conditions mentioned in paragraph (2) she shall be entitled to be registered. Those conditions are:

   (a) that she holds an approved qualification;

   (b) that she "satisfies the Registrar in accordance with the Council's requirements mentioned in article 5 (2) that [she] is capable of safe and effective practice as a nurse or midwife"; and

   (c) that she has paid the prescribed fee.

10. The condition with which we are concerned in the present case is (b). What it means is that the Registrar must be satisfied (in accordance with the prescribed requirements) that the applicant is in good health and of good character: although the reference is to article 5 (2) generally, the language of "requirements" and "capable of" make it clear that it is aimed specifically at element (b). The matters about which the Registrar has to be satisfied necessarily involve an exercise of judgement. In practice, what they require the Registrar to decide is whether the applicant's health and character are *sufficiently* good for them to be capable of safe and effective practice; and that is in fact recognised in the terms of the Council's guidance which I set out at para. 21 below – see the final sentence of paragraph 1 as there quoted. It is convenient to note here, by way of anticipation, that Mr Kark accepted that a conviction for drink-driving is in principle capable of demonstrating bad character such as to prevent the Registrar being satisfied that an applicant is capable of safe and effective practice, though of course he says that that was not so in the present case.

11. Paragraphs (4)-(5A) of article 9 require that the Registrar decide the application within three months of (broadly) the date of application. If no such decision is reached within that period the applicant can appeal – article 9 (6).

Renewal

12. Article 10 (1) provides that where a nurse wishes to renew her registration "at the end of a prescribed period" she should apply to the Registrar "in accordance with rules made by the Council". The prescribed period is three years: see rule 10 of the Registration Rules, where it is referred to as the "registration period". Paragraph (5) applies paragraphs (4)-(6) of article 9: in other words, the Registrar has to make a decision within the same time-scale as in the case of a first application for registration.

13. Rule 11 of the Registration Rules requires that a nurse be sent a renewal application form before the end of the registration period and a notice warning her that unless she submits the completed form, with the relevant fee, prior to a date specified in the notice her registration will lapse.

14. Rule 13 (1) of the Registration Rules provides that the Registrar must have received the materials required under rule 11 by the specified date. Those include "a declaration by the applicant, *with which the Registrar is satisfied*, as to her good health and good character [emphasis supplied]". Paragraph (2) provides that:

> "Subject to rule 14(4) to (6) and article 10(3) of the Order, a registrant's registration in a part of the register shall lapse at the end of the registration period unless it has been renewed in accordance with the provisions of this rule."

As I understand it, the way the system is supposed to work is that the notice and specified date will be sufficiently far in advance of the end of the registration period to allow a renewal decision to be made before registration lapses under rule 13 (2); but see para. 16 below for the possibility of extension.

15. Article 10 (2) provides that the Registrar shall grant such an application if the applicant satisfies conditions (a)-(c). Condition (a) is that she "meets the conditions set out in article 9 (2) (b) and (c)" – i.e. (so far as relevant for our purposes) that she satisfies the Registrar that she remains in good health and of good character. Conditions (b) and (c) concern requirements for continuing professional development and (where the registrant has not been in continuous practice) for additional education, training and experience.

16. Article 10 (3) provides that if the applicant does not comply with conditions (b) and (c) the Registrar may give her extra time to do so but that if she still has not done so within the specified time her registration will lapse. Rule 14 (5) allows the Registrar to extend the period by a maximum period of three months in order to allow the requirements of rule 13 to be complied with.

Lapse of registration

17. Article 12 is headed "Lapse of Registration". Paragraph (1) empowers the Council to make rules "providing for the procedure by which and the circumstances in which a registrant's name may be removed from the register on his own application or after the expiry of a specified period". Paragraph (2) reads:

> "Where a person's name is removed in accordance with this article or article 10 (3), his registration shall be referred to as lapsed."

18. Rule 14, also headed "Lapse of Registration", is the rule made under article 12 (1). Paragraphs (1) and (2) deal with applications by a registrant to have her name removed from the register. Paragraph (3) deals with cases where registration has lapsed under article 10 (3) (see para. 16 above). Paragraph (4) reads:

> "A registrant's registration shall not lapse under this rule or rule 12A[3] or 13
>
> (a) where the person concerned is the subject of an allegation under article 22(1) of the Order, or is treated under article 22(6) of the Order as if she were the subject of an allegation, or is the subject of any investigations or proceedings under Part V or VI of the Order, on the grounds only that she has not paid the prescribed

[3] I have not set out rule 12A, which applies to a distinct kind of application, for "retention of registration", which is irrelevant for our purposes.

> fee in accordance with the Fees Rules or has failed to apply for renewal in the prescribed form or within the prescribed time; or
>
> (b) if the person concerned is the subject of a suspension order, a conditions of practice order, an interim suspension order or an interim conditions of practice order."

Appeal

19. By article 37 (1) of the 2001 Order an appeal lies against a refusal by the Registrar of an application for registration or renewal. The appeal is in form to the Council but normally it is heard by an appeal panel in accordance with rule 25 of the Registration Rules: such a panel is generally referred to as "Registration Appeal Panel", though that actual term is not used in the Rules. By article 37 (10) a further appeal lies to (in England and Wales) the County Court.

Guidance

20. There was at the time of the appeals in the present case no guidance published by the Council specifically directed to how the Registrar or a Registration Appeal Panel should approach the question whether an applicant for registration (or renewal) is "capable of safe and effective practice", or more particularly about the requirements of good health and good character. However, it did in November 2010 publish a document addressed to "approved education institutions" ("AEIs") – that is, institutions undertaking the training of nurses and midwives – in order to "help [them] to ensure consistency in applying [the Council's] requirements for good health and good character". It is clear from the particular provisions of the document that those requirements would fall to be applied on admission to the AEI and/or to a particular course or programme. However, the requirements themselves must be the same as in the context of registration, and the guidance would thus appear to be relevant outside the specifically educational context. I will refer to it as "the 2010 Guidance".

21. A section of the 2010 Guidance headed "Good Character and Good Health" begins at page 8. Paragraph 1 itself, headed "Good Character", reads:

> "Good character is important and is central to the code in that nurses and midwives must be honest and trustworthy. Good character is based on an individual's conduct, behaviour and attitude. It also takes account of any convictions, cautions and pending charges that are likely to be incompatible with professional registration. A person's character must be sufficiently good for them to be capable of safe and effective practice without supervision."

Paragraphs 18-19 discuss the approach to be taken in considering an application for admission to an AEI or to a programme where the applicant's good character may be in issue by reason of a criminal conviction or caution. The relevant part reads:

> "Good character
>
> …

> 18 All applicants must be considered as individuals. Programme providers should assess each of them to decide what effect a conviction or caution might have on the person's ability to meet the NMC requirements for entry to a programme leading to registration. If an applicant has a conviction or caution or pending charges, the relevance, seriousness and circumstances in which the offence was committed must be taken into account.
>
> 19 The following issues should be considered:
>
> 19.1 whether the conviction or caution was disclosed
>
> 19.2 the degree of risk posed to patients and service users
>
> 19.3 the length of time since the offence
>
> 19.4 whether the applicant has a pattern of offending
>
> 19.5 how the applicant's situation has changed since the offence was committed
>
> 19.6 the circumstances surrounding the offence
>
> 19.7 the applicant's explanation of the offence
>
> 19.8 evidence submitted by the applicant, or referees, of good character
>
> 19.9 the applicant's commitment to work safely and effectively upholding the trust and confidence of patients and clients."

22. Since the decision with which we are concerned the Council has, in October 2015, issued guidance addressed specifically to the Registrar and to Registration Appeal Panels considering the requirements of article 9 (2) as regards good health and good character. I refer to this as "the 2015 Guidance". Paragraphs 20-29 contain detailed "guidance on assessing character for decision-makers", focusing very largely on criminal conduct and convictions. It is unnecessary to clog up this judgment by reproducing them here. For present purposes the only point that I need to make is that the Guidance makes it explicit that the "good character" criterion is not concerned only with the degree to which the conduct in question creates or evidences a direct risk to patients or service users: it is concerned also with the Council's "supporting objectives" of maintaining public confidence in the nursing profession and maintaining proper professional standards and conduct. This is apparent from paragraphs 20.2-20.3 and the rubric at the start of the following section, which read:

> "20. The decision should be taken with regard to our overarching public protection objective, *and also to take account of our supporting objectives* to:

> 20.1 …;
>
> 20.2 *promote and maintain public confidence in the professions; and*
>
> 20.3 *promote and maintain proper professional standards and conduct for members of those professions.*
>
> …
>
> Considerations for the decision-maker
>
> The nature and seriousness of the case especially as it relates to … protection of the public, *maintenance of professional standards and maintaining public confidence in the profession* [emphases supplied]".

That may involve a rather expansive understanding of the core concept of a nurse being "capable of safe and effective practice"; but it was common ground before us that it was legitimate. Consistently with that understanding, Mr Kark made it plain that it was not his case that a drink-driving conviction only reflected on a nurse's "character" where it evidenced some more general drink problem that might affect her performance at work: it could in principle justify a finding of bad character in its own right.

"FITNESS TO PRACTISE"

The Provisions of the 2001 Order

23. Part V of the 2001 Order deals with the procedures applying when the fitness to practise of nurses on the register (referred to as "registrants") is called in question. I need not attempt any comprehensive summary of the fitness to practise procedures for nurses. For our purposes the following points suffice.

24. The general functions of the Council in this regard are prescribed by article 21 of the Order as follows:

> "(1) The Council shall—
>
> (a) establish and keep under review the standards of conduct, performance and ethics expected of registrants and prospective registrants and give them such guidance on these matters as it sees fit; and
>
> (b) establish and keep under review effective arrangements to protect the public from persons whose fitness to practise is impaired.
>
> (2) The Council may also from time to time give guidance to registrants, employers and such other persons as it thinks appropriate in respect of standards for the education and training, supervision and performance of persons who provide services in connection with those provided by registrants.

(3) ...."

25. By article 22 (1) (a), the relevant procedures are engaged by the making of an allegation that the fitness to practise of a registrant

> "is impaired by reason of -
>
> (i) misconduct,
>
> (ii) lack of competence,
>
> (iii) a conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence,
>
> (iv) his physical or mental health."

The allegation may be made by a third party (most typically an employer) or, in a case where the relevant circumstance comes to its attention in some other way (for example if it is reported by the nurse herself[4]), by the Council (see article 22 (6)).

26. By article 31, where an allegation is made under article 22 an interim order can be made suspending the nurse's right to practise or imposing conditions where the relevant committee is satisfied that that is necessary for the protection of the public or is otherwise in the public interest or is in the interests of the nurse herself. By article 22 (8) a person who is the subject of an interim suspension order is "treated as not being registered".

27. How an allegation under article 22 is handled and resolved is governed by the Fitness to Practise Rules. For present purposes all that I need note is that if a case to answer is shown it will be considered either by the Council's Health Committee or by its Conduct and Competence Committee. By rule 24 (12) the Committee will be required to make a finding as to whether the registrant's fitness to practise is impaired. If such a finding is made it will have to proceed to consider what (if any) sanction to impose (rule 24 (13)). It may recommend mediation or decide that it is not appropriate to take further action (article 29 (4)); but otherwise it must impose one of four sanctions specified, in descending order of seriousness, in article 29 (5). It may:

> "(a) make an order directing the Registrar to strike the person concerned off the register (a 'striking-off order');
>
> (b) make an order directing the Registrar to suspend the registration of the person concerned for a specified period which shall not exceed one year (a 'suspension order');
>
> (c) make an order imposing conditions with which the person concerned must comply for a specified period which shall

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4 As she is professionally obliged to do: see para. 34 below.

not exceed three years (a 'conditions of practice order'); or

(d) caution the person concerned and make an order directing the Registrar to annotate the register accordingly for a specified period which shall be not less than one year and not more than five years (a 'caution order')."

28. By article 33 (2) a nurse who is struck off may not apply for restoration to the register for a period of five years.

29. At the risk of spelling out the obvious, it will be seen from the foregoing that the key concept under Part V of the 2001 Order and under the Fitness to Practise Rules is whether a nurse's "fitness to practise" is "impaired", whether that is the result of incompetence, misconduct or ill-health.

Guidance

30. The Council has issued guidance – the "Indicative Sanctions Guidance" – for the Health Committee and the Conduct and Competence Committee when they are considering what sanction to impose following a finding that a nurse's fitness to practise has been impaired. Paragraphs 57-77 review the available sanctions. For present purposes we are primarily concerned with paragraphs 74-77, which deal with striking-off, but I should set out paragraph 70, which is part of the section dealing with suspension, since there is a later cross-reference to it. It reads:

> "When considering seriousness, the panel should 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 the departure, along with any particular factors it considers relevant in each case".

31. As for striking-off, paragraph 74 sets out three "key considerations", 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 ?"

The effect of 74.1 is that, as one would expect, the committee should only impose the sanction of striking-off if it considers that none of the lesser sanctions is sufficient. This was referred to before us as "the graduated approach".

32. Paragraph 75 begins:

> "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)."

The list which follows includes, at paragraph 75.2:

> "doing harm to others or behaving in such a way that could foreseeably result in harm to others, particularly patients or other people the nurse or midwife comes into contact with in a professional capacity, either deliberately, recklessly, negligently or through incompetence".

Mr Kark accepted that this head is, in principle, capable of applying to cases of drink-driving.

33. Paragraph 76 notes that:

> "The courts have supported decisions to strike off healthcare professionals where there has been lack of probity, honesty or trustworthiness, notwithstanding that in other regards there were no concerns around the professional's clinical skills or any risk of harm to the public. Striking-off orders have been upheld on the basis that they have been justified for reasons of maintaining trust and confidence in the professions."

The point made in the final sentence is important. It is clearly supported by the decisions of this Court in *Bolton v The Law Society* [1994] 1 WLR 512, and of Sullivan J in *R (Low) v General Osteopathic Council* [2007] EWHC 2839 (Admin), both of which recognise that in this context maintaining public confidence in the profession in question is an important consideration. It parallels the construction put by the Council on the concept of being "capable of safe and effective practice": see para. 22 above.

34. I should mention one other point, which does not appear in the Guidance to which I have so far referred but in "the Code", which prescribes standards of conduct for nurses and midwives generally. Paragraph 23.2 requires a nurse to notify the Council as soon as possible about any criminal charge or conviction.

(A) DID THE PANEL TAKE THE WRONG APPROACH ?

35. As already trailed, Mr Kark's principal case on this appeal is that the Registration Appeal Panel should have applied the same criteria to the question whether the Appellant's conviction meant that she failed to satisfy the requirement of good character as a panel of the Conduct and Competence Committee would have applied to the question whether it meant that her fitness to practise was so impaired that she should be struck off; but that the Panel in fact applied less stringent criteria. I will consider first the question of principle as to which approach ought to be adopted.

THE CORRECT APPROACH IN PRINCIPLE

36. Mr Kark's essential proposition is that where a nurse has been guilty of criminal conduct the fundamental question is necessarily the same whether it arises in the context of an application to renew registration or in the context of disciplinary proceedings – namely, is the conduct in question such that she should no longer appear on the register ? Since the fundamental question is the same, it followed that the same approach ought to be taken in either context.

37. Mr Kark reinforced that basic submission by pointing out that in the case of a nurse applying for renewal of an existing registration it will be largely a matter of chance by which route the question comes up for decision. Although the normal route will be by way of an allegation which triggers the fitness to practise procedures, there will inevitably be some cases where the conviction occurs so close to the expiry date of the nurse's registration that the Council will first become aware of it when it is declared – as it would have to be – in the renewal application, and its consequences will, at least on the procedure currently adopted, fall to be considered in that context rather than in disciplinary proceedings. It would be arbitrary and unfair if the happenstance of when the conviction occurred led to the application of any different standard or approach.

38. Mr Kark acknowledged that there is a complication in the facts of the present case. The Appellant's conviction occurred some months before the expiry of her term but she failed to notify the Council at the time. She had asked her husband, who was a Royal College of Nursing "steward", to check when she should disclose the conviction. His account was that he had telephoned the Council and been told by someone there that if it was "near the end of the [registration] cycle" disclosure could be made when the renewal papers were received. It may be debatable whether her failure to follow the Code was in those circumstances venial, but Mr Kark submitted that that did not in any event affect the question of principle, since on any view there would be cases, albeit no doubt a minority, where the interval between conviction and renewal date is genuinely too short for the disciplinary procedures to be engaged.

39. It follows, Mr Kark submitted, that in those cases where the consequences of a criminal conviction fall to be considered in the context of a registration application – and *a fortiori* a renewal application – the Registrar, or Registration Appeal Panel, should follow the terms of the Indicative Sanctions Guidance. That means that it should follow the graduated approach there indicated (see para. 31 above) and should only refuse registration or renewal where it considers that the public cannot be protected by any lesser sanction (see paragraph 74.1 of the Guidance) and where the conduct in question is "fundamentally incompatible with being a registered professional" (paragraph 75).

40. Mr Kark referred to two authorities which he said supported that approach – *Council for the Regulation of Health Care Professionals v General Dental Council and Fleischmann* [2005] EWHC 87 (Admin) (to which I will refer as "*Fleischmann*") and *Jideofo v The Law Society* [2007] EW Misc 3. I take them in turn.

41. In *Fleischmann*, a dentist was convicted of possession of pornographic images of children. The Professional Conduct Committee of the General Dental Council decided that he should be suspended from the register for twelve months. The

Council appealed to the High Court on the basis that the sanction was unduly lenient. Newman J allowed the appeal and held that erasure from the register (the equivalent of striking-off in the case of a nurse) was the only appropriate sanction. The nature of the offence was such that there was no real risk to patients, and the essential justification for disciplinary action was the injury which his conduct would cause to the reputation of the profession. In that context reliance was placed on the fact that, although there was no explicit reference to "bad character" in the context of the provisions governing disciplinary action, on an application for registration a dentist was required to satisfy the registrar that he was of good character. Newman J accepted that that was an indication of the proper approach to the disciplinary power. At para. 55 of his judgment he acknowledged that the provisions relating to discipline were different from those relating to registration, particularly inasmuch as erasure was not automatic and there was a "graduated approach to the penalty … designed to secure proportionality". He continued:

> "Thus the disciplining of a registered dentist involves subtly different considerations from those which apply to an applicant for registration. That said, I have no doubt that the differences should not be allowed to give rise to the existence of a double standard in connection with those who are entitled to be in practice. The requirement that an applicant for registration be of "good character" secures the need for the public to be protected by the maintenance of high standards and the high reputation of the profession which has to be served at the stage of an application for registration as well as in disciplinary proceedings. The protection of the public will not be served by the application of a different standard at erasure from that which is applied when considering registration."

42. In *Jideofo* Sir Anthony Clarke MR, in the context of the powers then enjoyed by the Master of the Rolls as regards the disciplining of solicitors, was called on to decide as a matter of principle what was "the appropriate test for determining an individual's character and suitability for admission as a student member of the Law Society and then as a solicitor": see para. 1 of his judgment. At para. 8 he observed that:

> "While there is no authoritative guidance as to the correct approach to be taken when carrying out these assessments, there is a well-established analogous jurisdiction, which arises where the question is whether a solicitor ought to be struck off the roll and what are the circumstances relevant to any application to be restored to the roll following a strike-off made on the grounds of the solicitor's dishonesty. It is this jurisdiction which it is submitted ought to also govern the position pre-admission."

Later, in the context of whether the same approach should be taken to misconduct occurring pre- or post-admission as a solicitor, he said:

> "14. ... It would be irrational to hold that a different test applies where matters come to the Law Society's attention pre-admission from the case where those same matters come to its attention post-admission. Whether they are discovered pre or post-admission the question remains the same, namely whether the relevant evidence demonstrates

> that the person concerned is a fit person to be a solicitor. It would make no sense for the Law Society to admit an individual whose conduct, if assessed by the SDT, would lead to them being struck off the roll as being an individual who was not a fit and proper person to be a solicitor.
>
> 15. I note in passing that a similar approach was adopted by Newman J in the case of dentists *Fleischmann* [2005] EWHC 87 (Admin). He said at [55] that, when assessing conduct and misconduct, the same standard should be applied to pre-admission and post-admission behaviour. He put it this way:
>
> > '… the disciplining of a registered dentist involves subtly different considerations from those which apply to an applicant for registration. That said, I have no doubt that the differences should not be allowed to give rise to the existence of a double standard in connection with those who are entitled to be in practice. The requirement that an applicant for registration be of "good character" secures the need for the public to be protected by the maintenance of high standards and the high reputation of the profession which has to be served at the stage of an application for registration as well as in disciplinary proceedings. The protection of the public will not be served by the application of a different standard at erasure from that which is applied when considering registration.'
>
> It is, however, fair to add that Newman J accepted in the same paragraph that there may be subtly different considerations to take account of in applying the standard to a dentist as opposed to an applicant for registration, but the standard remains the same. I agree and to my mind the same considerations apply to solicitors."

43. Mr Kark submitted that although neither of those authorities was binding on us both clearly supported his basic case.

44. Those submissions have some force. There will be many cases where the fact that a nurse had a particular criminal conviction would justify both the conclusion, if she was applying for registration (or renewal), that she was not capable of safe and effective practice and the conclusion, if she was already on the register, that her fitness to practise had been so seriously impaired that she should be struck off. In such a case the essential question would indeed, as Mr Kark submitted, be the same, notwithstanding the difference in the statutory language – i.e. ought this person be on the register ? – and would depend on the same considerations.

45. However, I do not believe that the fact that the relevant questions, and answers, will in the more serious cases be the same justifies disregarding the distinction between a registration decision and a disciplinary decision. The "subtly different considerations" recognised by both Newman J in *Fleischmann* and Sir Anthony Clarke in *Jideofo* are real. As Ms Morris pointed out, the essential difference between the two situations is that whereas in the disciplinary context the panel has available to

it a range of sanctions – ranging from striking-off, via suspension and the imposition of conditions to a caution – the decision on a registration application (including an application to renew) is binary. An application for registration (or renewal) must either be admitted or refused: there is no such thing as suspended or conditional admission. This gives rise to a problem in a case where the conviction would not, if considered under the fitness to practise procedures, justify striking-off but where it would, say, justify suspension or the imposition of conditions. If Mr Kark's submission as summarised at para. 39 above were right, it would mean that in a "half-way" case of this kind the Registrar would be obliged to admit the applicant to the register, with immediate effect and unconditionally. I do not regard that result as acceptable. It would mean that the applicant was in a better position than a nurse who had committed the same offence but whose case had been considered under the fitness to practise procedures; and, more importantly, the public would be deprived of the protection which suspension or the imposition of conditions would have been intended to achieve. It would also be hard to reconcile with the language of article 5 (2). If a nurse whose fitness to practise would, in disciplinary proceedings, be held to be so impaired as a result of a criminal conviction that her registration should be suspended it is hard to see how she can be said to be "capable of safe and effective practice".

46. Mr Kark submitted that that unsatisfactory result could be avoided by some fancy footwork with the rules. He said that in a case where an applicant for registration or renewal disclosed a conviction it was open to the Registrar to refer the case to the Council under article 22 (6) for disciplinary investigation, which could if appropriate lead to the imposition of interim suspension or the imposition of interim conditions; and he submitted that if that was done no decision on the application would be required because the registration would be preserved by rule 14 (4) (b) (see para. 18 above). Ms Morris in her post-hearing submissions adopted a suggestion from the Court that this route would not work, because rule 14 only prevents a registration from lapsing "under this rule or rule … 13" and that in the kind of case under consideration neither of those rules applied. Mr Kark, by contrast, submitted that the case fell squarely under rule 13 (2), though he also acknowledged that "the legislative wording is not drafted as clearly as it could have been".

47. We did not hear oral argument on this point: indeed one of the provisions on which both parties relied in their written submissions, rule 14 (5), was not in the version of the 2004 Rules supplied at the hearing. In those circumstances I am reluctant to reach a definitive conclusion on the technical availability of Mr Kark's escape route. I am prepared to assume (in accordance, in fact, with my provisional understanding) that it is indeed available. But I do not believe that it is a route which the Council is obliged to take, or which it would normally be appropriate to take, in a case of the kind with which we are concerned. The legislation sets up two separate procedures, for registration (including renewal) and for fitness to practise, and I do not think that it is appropriate for the Council to go through elaborate manoeuvres in order to procure that a type of case that falls within the terms of one procedure should be decided under another. It is, I think, clear that the draftsman included rule 14 (4) in order to ensure that disciplinary proceedings which are already pending do not lapse simply as a result of the nurse's registration period expiring before they can be concluded. It is most unlikely that it was contemplated that it would be used to divert good character

issues routinely arising in a registration context into the fitness to practise channel. The two streams should be kept separate.

48. In the context of a first application for registration there is no possible unfairness in thus maintaining the distinction between the registration and fitness to practise regimes. It would be bizarre to admit a nurse to the register – which involves, as I have said, a judgment that she is capable of safe and efficient practice – with a view to her being immediately suspended or subjected to conditions on the basis that she was not fit to practise without safeguards.

49. That being so, I have difficulty seeing how, in principle, a different approach could be justified in the case of a nurse already on the register. As Mr Kark acknowledged, the good character criteria for first registration under article 9 and renewal under article 10 are identical. I do accept that this will sometimes give rise to the situation which Mr Kark says is unfair (see para. 37 above) – that is, where a nurse has her conviction dealt with under a binary regime rather than one where there is a wider range of options. To the extent that there is some unfairness, I believe that that has to be accepted as a consequence of the existence of the two distinct regimes. But I do not in fact believe that the unfairness is as great as Mr Kark suggested. That is for three reasons.

50. First, cases where a conviction which might otherwise have been dealt with under the fitness to practise regime fall instead to be dealt with on renewal will be unusual, at least if nurses comply with their obligation to report convictions promptly. Only in the unlucky case where the conviction occurs towards the end of the registration period may there be insufficient time for a disciplinary decision to have been taken before the end of the three-month period (or sometimes six) in which the Registrar has to make her decision (see para. 14 above). (I note for completeness that in the more serious cases an interim suspension order will generally be made, in which case renewal will not be appropriate because the nurse is treated as not being on the register – see para. 26 above; but I accept that those will not typically be the kind of case in which the different regimes would produce different outcomes.)

51. Secondly, what a nurse loses by having the consequences of her conviction assessed on a binary rather than a graduated basis will always be a matter of speculation and will not necessarily be of substantial benefit. What it amounts to is the chance that she might have been be able to maintain her registration but only subject either to suspension or to the imposition of conditions.[5] As to suspension, although there is no doubt a difference between being suspended and not being admitted to the register at all (whether initially or on a renewal application), the fundamental consequence in both cases that the nurse is unable to practise. As to the imposition of conditions, I accept that that is preferable to not being on the register at all, because the nurse may be able to continue to practise; but there will be no certainty in any particular case that that would have been the alternative.

52. Thirdly, a nurse who is refused registration on good character grounds can apply again at any time. If the conviction was one that would have led to her being struck

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[5] These are not the only two "half-way" options; but it is hard to see renewal being refused on the basis of an offence which under the fitness to practise procedures would only merit a caution.

off if she had been the subject of fitness to practise proceedings, she is in principle in a better position since a nurse who has been struck off cannot re-apply for five years – see para. 28 above. But even in the case where a lesser sanction would have been imposed, such as suspension, she could re-apply after a period and contend that she had in practice suffered an equivalent sanction.

53. For those reasons I would reject Mr Kark's submission at para. 39 above. The Registrar or the Registration Appeal Panel should follow their own specified criteria. No doubt those criteria overlap with those in the Indicative Sanctions Guidance, but the difference in the options as regards the less serious cases means that the overlap cannot be total. And, that being so, cross-referring to the Indicative Sanctions Guidance is more likely to create confusion than illumination.

54. I should, at the risk of repetition, make it clear that my conclusion does not affect the reasoning or decision in either *Fleischmann* or *Jideofo*. The points made in those cases are entirely unexceptionable in the context of the particular questions being considered, but they cannot be read as governing the different question which we considering. In particular, while it is no doubt correct that if a conviction would warrant striking off it would also warrant a refusal to register, the reverse is not necessarily the case: for the reasons discussed above, there may be cases where a conviction may be sufficient to justify a refusal to register even if the same conviction might not justify striking off.

55. The conclusion which I have reached on this question is essentially the same as that of Judge Freedman. It implies no disrespect for his careful and thoughtful judgment that I have not found it necessary to refer to the details of his reasoning.

THE APPROACH TAKEN BY THE PANEL

56. I have felt obliged to deal with the issue of principle as fully as I have since it is of general importance. But it is a curiosity of this case that on the face of it the Panel did in fact adopt the approach advocated by Mr Kark. As appears from the transcript, Mr Meiland submitted to it in terms that:

> "Unless the panel is satisfied that it would strike off the registrant if you were a fitness to practise panel in my submission the panel should allow this appeal."

He continued:

> "I would invite the panel to look at the Indicative Sanctions Guidance and, as a fitness to practise panel would do, consider, starting from the bottom, whether a strike-off is the only proportionate sanction in this case. If the panel considers that a lower sanction would have been proportionate if this was a fitness to practise case then the appeal should be allowed."

That approach was apparently then discussed by both counsel with the legal assessor, who formally endorsed it: he described the "parallel … with a striking off" as "entirely proper". The Panel said explicitly that it accepted the legal assessor's

advice, and when it came to give its reasons, in a passage which I set out below, it referred to a number of the factors identified in the Indicative Standards Guidance.

57. Mr Kark did not accept that analysis. He argued that, although the Panel purported to accept the advice of the legal assessor, when one looked at the detailed reasoning it could be seen that they had in fact departed from it. I do not agree, but since I have concluded that it was not obliged to follow it in the first place there is nothing to be gained by my pursuing the point further.

(B) THE SUBSTANCE OF THE DECISION

58. Mr Kark's submission here is that on either approach the Panel's decision to refuse registration was wrong. He acknowledged, as I have said (see para. 22 above), that in principle a drink-driving conviction was capable of constituting "bad character" sufficient to justify the conclusion that a nurse was not capable of safe and effective practice; also (since on his approach the standards were the same) that it might constitute conduct "fundamentally incompatible with being a registered professional" within the meaning of paragraph 75 of the Indicative Sanctions Guidance (see para. 32 above). But he said that the circumstances of the Appellant's case, including some strong mitigating circumstances, were such that her conviction did not justify either conclusion.

59. I start with the circumstances of the Appellant's conviction for drink-driving. They are helpfully summarised by Judge Freedman as follows:

> "6. The event which directly led to the refusal to renew the appellant's registration was a conviction for driving with excess alcohol. The incident occurred on 2nd February 2013. The conviction was recorded on 27th February 2013. The alcohol level was 117mg in 35ml of blood, over three times the prescribed limit. The appellant was fined £665 and disqualified for three years.
>
> 7. The appellant gave evidence before the panel that during the week leading up to the drink driving incident, she had been on night shift with a very heavy workload. She finished work on the Friday morning. On the Friday evening, she went out for a meal with her fiancé (now her husband). She slept badly that night. On the following morning, at the request for her husband, she drove him to the Freeman Hospital where he is employed as a nurse. On her return home, she decided to clear the drive of ice and snow. In the course of doing so, she had two glasses of Cointreau, described by her as being half full wine glasses. She then went to bed to catch up on sleep. It was apparently her intention to do some housework after having a couple of hours of sleep. However, when her alarm went off she says that she woke up "*in a complete panic thinking I was late to pick my husband up from work*". (In fact, the arrangement had been that her husband would take the bus home.) She proceeded to drive to the front car park of the Freeman Hospital which was the usual pick up point. As she reversed her car in the car park, her vehicle seems to have skidded on ice and collided with a stationary car behind. Having inspected the damage, she then drove to the main part of the Freeman Hospital in order to tell her husband about the incident

> and to leave a note with her details on the other vehicle. As she was getting out the car, she was spoken to by a security guard and a nurse who, in due course, called the police. Part of her mitigation was that it had not been her intention to drive that day after consuming the Cointreau.
>
> 8. It is right to observe that the panel found the appellant's account of this incident as being *implausible*; and they concluded that the appellant's evidence *was not compelling*. In particular, they did not accept that the appellant was unaware of her intoxicated state when she decided to drive to the Freeman Hospital that morning. Obviously, the panel, unlike me, had the advantage of hearing the appellant give evidence and observing her demeanour but I am bound to say that I do not find the panel's comments about the appellant's account of the incident to be in any way surprising. I tend to agree that this account lacks a degree of credibility, at least insofar as the appellant says that she had not appreciated that she would not be fit to drive."

60. As I have already said, this was not the Appellant's first such conviction. Again, I can take the details of her earlier conviction (so far as they are known) from the judgment of Judge Freedman, at para. 9:

> "… On 30th July 2008 the appellant was made subject to a community order for twelve months with a curfew requirement of 56 days as well as a two year disqualification. The severity of the sentence would tend to imply that the appellant was substantially over the limit on this occasion. It was said that this offence was committed at a time when the appellant was suffering from stress and anxiety: she had lost her job and she had been diagnosed with anorexia nervosa. She maintained that the difference between the incident in 2008 and the incident in 2013 was that on the former occasion, she was well aware she was over the limit when she drove."

61. The Appellant and her husband gave evidence to the Panel and put in documentary evidence. The material which Mr Meiland relied on before the Panel by way of mitigation can be summarised as follows:

(1) As regards the Appellant's attitude to her offending, she had in her evidence made clear that she understood the risk that her conduct had caused to the public and its impact on the image of the profession. She accepted full responsibility and was remorseful. She had taken positive steps to ensure that the same thing never happened again. She had been on a course for people with drink-driving offences and she no longer kept alcohol in the house or used it to help her get to sleep.

(2) As regards her work, an appraisal from her employer was put in speaking highly of her judgement, decision-making skills and reliability. There were also positive character references from colleagues. The Appellant said that she had never been drunk at work.

(3) A report was put in from a consultant psychiatrist confirming that the Appellant did not have a drink-related health condition.

(4) She had immediately disclosed her conviction to her employer. The only reason that she had not disclosed it straightaway to the Council was the wrong advice from her husband, whose evidence was that he himself had been given the wrong advice by someone he had spoken to at the Council.

62. Against that background, I can set out the final section of the decision of the Panel, in which it gave its reasons for dismissing the appeal. This reads:

> "The panel considered all of the information put before it, including the character references provided by you. The panel was mindful that you were appealing against the Registrar's decision that you do not have the necessary good character to be capable of safe and effective practice as a registered nurse and that the onus was on you to provide evidence to persuade it otherwise. The panel carefully considered the evidence you gave on oath and your answers to the questions you were asked.
>
> The panel notes all the documentation provided and accepts fully that you are a competent and experienced nurse.
>
> The panel concluded that your account of the offence in 2013 was implausible and that your evidence was not compelling. Of particular concern for the panel was the fact that this is a second, very serious offence. The panel was not reassured by what you felt was the difference between your offending in 2008 and the commission of the offence in 2013. The panel finds it implausible you were unaware of your intoxicated state when you got behind the wheel to drive that morning.
>
> It is the panel's conclusion that, looking at the guidance at paragraph 19 of Good Health and Good Character [see para. 21 above], the only conclusion to reach is that your conduct was such that you are not capable of safe and effective practice.
>
> The panel determined that you did not properly disclose your conviction to the Registrar when you were required. Whilst it is accepted that Mr Doherty made enquiries on your behalf in April 2013, it was your responsibility to disclose the conviction as soon as you were charged with the offence as you had been advised in October 2010. The panel also notes that the Code requires you to notify the Registrar following any criminal charge.
>
> The panel determined that your conduct did pose a risk to both patients and service users arising out of the fact of your misconduct. You drove your car into a hospital car park whilst three times the legal limit for alcohol, and in doing so were involved in an accident, however minor. The panel considered the risk of such conduct occurring in the future and considered that, as you were unable to

> explain how the second offence had occurred, there is a risk of repetition.
>
> Further, the panel determined that the length of time between the offences and their relative seriousness does demonstrate a pattern of offending. The panel notes the conclusions in the pre-sentence report, but nevertheless cannot ignore the fact that this was your second offence of this kind within 5 years.
>
> The panel has concluded that you have not demonstrated that you have the necessary good character to be capable of safe and effective practice. The panel therefore dismiss this appeal and uphold the decision of the Registrar.
>
> The panel is of the conclusion that these were serious, similar offences only 5 years apart. The panel notes the seriousness of each offence on its own and the risk to members of the public. As such the panel feels that the Registrar's decision was a proportionate response and accordingly this appeal is dismissed."

63. The hearing before the Judge was, as he noted, by way of re-hearing, but neither party asked him to consider any evidence beyond what was before the Panel – there was a transcript of the oral evidence – and he was not invited to depart from any of its primary findings of fact. At para. 55 of his judgment he described the issue as being "whether it can be said that the Registrar/panel came to a wrong conclusion in finding that the appellant's character was such that she was not capable of effective and safe practice". He then addressed in turn various specific grounds of appeal advanced by Mr Meiland. Those grounds are not relied on, at least as such, before us, and I need not therefore set out his reasoning, but I note the following points:

(1) At para. 56 he endorsed the Panel's reliance on the fact that the Appellant drove carelessly in a hospital car park.

(2) At para. 57 he addressed a submission that the Panel gave insufficient weight to the Appellant's positive appraisal and testimonials. He observed that the weight to be given to that material was a matter for the Panel and that ultimately it was its own responsibility to form a view of "the appellant's character in the context of whether she was capable of safe and effective practice".

(3) At paras. 58-59 he addressed a submission that the Panel should not have formed the view that there was a risk of similar offending in the future. He held that that conclusion had been reasonable.

64. At para. 60 the Judge concluded:

> "Ultimately, the question which has to be posed is whether the panel's decision to uphold the decision of the Registrar was wrong. I have already observed that in my judgment there was no error of law. Equally, and whilst it is conceivable that a differently constituted panel might have come to a different decision or indeed that a judge hearing the appeal might have come to a different decision, it is quite

> impossible to conclude that the decision made by the panel was wrong. As it seems to me, they took into account all relevant matters and they did not take into account irrelevant matters. Additionally, of course, they had the advantage of hearing and seeing the appellant and making their own assessment of her character. I should add this: I am not prepared to speculate as to whether if the matter had gone before the Conduct and Competence Committee the outcome would have been the same or different."

65. Mr Kark's essential submission before us was that the Panel's reasons and conclusion paid insufficient regard to the mitigating circumstances to which I have referred, and that the Judge was wrong not so to find. He also submitted that the case showed none of the kinds of circumstances identified in the Indicative Standards Guidance as illustrating when a conviction was fundamentally incompatible with registration or where striking-off would be proportionate, such as dishonesty, harm to patients or abuse of trust.

66. I cannot accept that submission. This Court, like Judge Freedman, is only entitled to overturn the decision of the Panel if we are satisfied that it was wrong; and in making that judgement we must pay appropriate respect to the view of the specialist tribunal about the standards required in order to maintain public confidence in the profession (that being, as I have said, an important element in the assessment of good character): see, for example (there are many), the judgment of Laws LJ in *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46, [2007] 1 WLR 1460, at paras. 20 and 26 (pp. 1482 and 1484). We must also bear in mind the advantage the Panel had in hearing the Appellant's evidence for itself.

67. Taking that approach, I, like Judge Freedman, can see nothing wrong in the Panel's conclusion. In the passage which I have quoted it identified the circumstances which made this offence particularly serious. It was a second offence over a five-year period; the Appellant was three times over the limit; although she had injured no patients she had nevertheless had an accident in the hospital car-park; it did not credit her evidence that she did not realise that she was over the limit; and there was (in those circumstances) a risk of recurrence. It was on that basis fully entitled to find that she was not capable of safe and effective practice, and none of the mitigating circumstances were such as to undermine that conclusion.

DISPOSAL

68. I would dismiss this appeal.

Lord Justice Davis:

69. I agree.

Sir Terence Etherton, MR

70. I also agree.