

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 3356 (Admin)



Royal Courts of Justice

No. AC-2023-LON-003283

Monday 15 January 2024

Before:

DAVID LOCK KC
(Sitting as a Deputy Judge of the High Court)

BETWEEN :

NURSING AND MIDWIFERY COUNCIL

Applicant

- and -

DEOJLT PERSAND

Respondent

MISS R PATERSON (of the Nursing and Midwifery Council) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE DEPUTY JUDGE:

- 1 This is an application by the Nursing and Midwifery Council (“**the NMC**”) under article 31(8) of the Nursing and Midwifery Order 2001 (“**the Order**”) to extend the period to which Mr Persand should be subject to conditions on his ability to practice as a nurse. This was one of 6 applications which came before me under the same provision. I gave a short extempore judgment following the application on 15 December 2023, but it was reported to me that the NMC have asked for a transcript. That request has given me the opportunity to expand the extempore judgment to explain the reasons for the order in slightly more detail, and to put the decision in the context of the series of other NMC cases which came before me on the same day because there were a series of issues which arose in several of the cases which deserve to be noted in a judgment. I was subsequently told that there may have been a mix-up between NMC and the transcribers because the NMC thought they were requesting a transcript of one of the other matters. Be that as it may, the preparation of this judgment seems to me to be justified as there were issues in common in all the NMC cases interim order cases which I was asked to consider.
- 2 The primary facts of this case are that the NMC received a referral relating to this Respondent (“**Mr Persand**”) on 20 October 2021, namely over 2 years ago. The referral came from a care home (“**Care Home A**”) where Mr Persand had been employed as a registered home manager, although he had left that employment on 3 September 2021. The operators of Care Home A alleged that between February 2021 and July 2021, when the Respondent was working as a registered general nurse and the home’s manager, Mr Persand failed to provide and oversee safe and effective care for a single resident. It was alleged that this failure contributed to a significant deterioration in the resident’s medical condition and this led to the resident’s admission to hospital for consideration of an above knee amputation. Although no amputation was carried out, a safeguarding referral was raised by the hospital staff concerning the quality of care that this resident has received at the care home.
- 3 After leaving Care Home A, Mr Persand went to work as a Home Manager at another care home (“**Care Home B**”), taking up that role on 28 September 2021. A witness statement sworn in these proceedings said that the information available to the NMC suggested:

“... the Respondent allegedly walked out [of that job] without telling anyone because other staff members had raised concerns that the Respondent had behaved in a bullying manner towards colleagues and didn't talk to residents”

- 4 As far as I can tell from the material provided to me, no one from Care Home B appears to have approached the NMC with a complaint about Mr Persand arising from these events. However, concerns about Mr Persand's practice emerged when NMC investigators were making inquiries about Mr Persand following the issues raised in relation to the clinical incident at Care Home A.
- 5 Following the end of Mr Persand's employment with Care Home B, Mr Persand applied to a further care home (“**Care Home C**”) for a role as a registered nurse and was employed there. The NMC's investigations raised concerns that Mr Persand provided incorrect information on his CV when he applied to work at a Care Home C. The concern identified by investigators was that the CV he submitted for this job application suggested that he had been continuously employed at Care Home B since February 2021, thereby concealing of his prior employment at Care Home A, where the safeguarding enquiry had been raised. In addition, Mr Persand claimed he had been employed as a Band 6 nurse in his last NHS role, when the information available showed that he was employed at a Band 5 role. I am told that Mr Persand accepts he provided incomplete and misleading information about his career history when he applied for this job.
- 6 The NMC sought records from Care Home A where the clinical incident was reported and Care Home B where Mr Persand had gone to work following the end of employment at Care Home A. These records were provided on 10 November 2021 and further documents were provided on 16 November 2021 and again on 6 December 2021. Accordingly, in this case, it appears that the NMC had a complete set of the relevant documents from Care Homes A and B by 6 December 2021, namely within about 6 weeks of the original referral.
- 7 The case was referred to an NMC clinical advisor who recommended the NMC investigator seek documents from the hospital trust that was treating the relevant patient. These documents were requested and provided by 21 January 2022. The clinical advisor then responded to the NMC investigator with his or her comments on 9 February 2022. At some point, which is not identified in the papers but must have been prior to February 2022, the NMC were also provided with material from a Care Quality Commission inspection of Care Home C in which staff at that care home raised concerns about Mr Persand. These documents

suggested that concerns were raised by staff that Mr Persand had shouted at other members of staff, was rude to them, belittled them and did not talk to residents.

8 I fully accept that, from October 2021 until early February 2022, the NMC investigated this case with appropriate diligence. However, nothing appears to have happened in relation to this case for the next 4 and a half months from February 2022 to June 2022. Mr Thurgood, who swore a witness statement on behalf of the NMC, has not explained why no further steps were taken in relation to this file. He described this delay period of delay as a “*regrettable oversight*”.

9 Following the imposition of an interim suspension order in June 2022, the documents before me suggest that the case stalled again because nothing substantial happened on the case for the next 5 months. On 22 November 2022, the NMC instructed Capsticks solicitors to carry out an investigation on behalf of the NMC and an investigation plan was agreed on 6 December 2021. There is no explanation in the witness evidence as to why the case was not referred to external solicitors for investigation in February 2022, as opposed to waiting for over 9 months until the end of November 2022 before doing so.

10 Capsticks appear to have had a series of difficulties with witnesses but they substantially completed their report by February 2023. However, they persisted in seeking to resolve matters with reluctant witnesses and those delays meant that they only produced their final report for the NMC on 31 August 2023. At that point, the case was then ready to go to the NMC’s case examiner but there were then further delays whilst that process was undertaken. Mr Thurgood says at paragraph 24 of his witness statement:

“The Applicant wishes to take this opportunity to apologise to both the Respondent and the Court for the delays it has caused to the progression of this case”

11 It seems to me that delays in the investigation of regulatory concerns which can lead to disciplinary action against a nurse who is subject to interim measures (as explained below) are more than a regrettable oversight which can be cured by an apology.

12 Professional regulatory proceedings are proceedings to which article 6 ECHR applies: see *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 as explained by the Supreme Court in *R (G) v Governors of X School and another* [2012] AC 167 at paragraph 38. It follows that, once regulatory proceedings were commenced by the NMC against Mr Persand and in particular once interim measures were taken to suspend Mr Persand, the NMC

was required to discharge its functions in a way that complied with its duties to Mr Persand under article 6 ECHR: see the duty in section 6(1) of the Human Rights Act 1998. Once proceedings have been commenced, a public body has a duty to ensure that the case is brought to a final determination within a “reasonable time”. In *Beaumartin v France* (1995) 19 EHRR 485, the European Court of Human Rights noted that the Commission said as follows at paragraph 46 of its decision:

“While only delays imputable to the State can justify the conclusion that there has been a failure to comply with the “reasonable time” requirement, it should be noted that in assessing the reasonableness of the length of proceedings regard must be had to the complexity of the case, the applicant's conduct and that of the competent authorities”

- 13 That approach was followed by the European Court of Human Rights which said at paragraph 33 that long periods during which the proceedings stagnated without any proper explanations may not be compatible with article 6. That approach has also been followed in a series of further cases. Where interim measures are taken to restrict the ability of a nurse to pursue his or her career, it seems to me that the duty to ensure that such proceedings reach a conclusion within a reasonable time must impose a duty on the NMC to ensure that it is acting with reasonable diligence in the progress of its investigations. Whilst there must be a measure of discretion given to the NMC to decide what steps to take to progress the investigation and what lines of inquiry to follow, the NMC is likely to act in breach of its duties under article 6 if it fails to progress its investigations with reasonable diligence.

The Interim Orders.

- 14 On 15 June 2022 this case was sent by the Screening Decision Maker at the NMC to be considered by the NMC Practice Committee for a possible interim order. By that point, there appeared to be three areas of investigation, namely (a) the clinical incident involving the resident at Care Home A, (b) dishonesty in relation to Mr Persand’s job application at Care Home C and (c) conduct issues at both Care Homes B and C. As regards the original matter for which Mr Persand was referred to the NMC, the Practice Committee said:

“... in relation to the concerns raised at [Care Home A] the panel determined it was difficult to find material within the substantial documentation to support the allegations at this stage to support a prima facie case”

15 The Practice Committee noted that Mr Persand had accepted that he had not provided accurate information on his job application for Care Home C but the Practice Committee felt that it still needed to impose interim sanctions because, despite that acceptance, the Practice Committee “*did not consider that it sufficiently mitigated the risk of repetition*”. As explained below, in my judgment that was the wrong approach as it set the bar too low for making of an interim order. The core of the Practice Committee’s decision making was as follows:

“Given the allegations arose across two separate organisations the panel considered that the allegations of bullying and the effect on patient care along with the dishonesty allegations may suggest wider attitudinal concerns. Consequently, the panel is satisfied that an interim order is necessary to protect the public.

The panel has concluded that an informed member of the public would be concerned if a registered nurse facing such allegations was allowed to practise without restriction whilst an investigation is carried out by the NMC. The panel therefore concluded that an interim order is necessary on the grounds of public protection and is otherwise in the public interest, in order to maintain confidence in the professions and the NMC as regulator”

16 I will consider below whether that passage was consistent with the approach that the Practice Committee was required to take under the Order. However, the consequence was that, from 30 June 2022, an interim suspension order was imposed on Mr Persand for a period of 18 months.

17 Mr Persand’s suspension was reviewed and approved on one occasion. On 20 June 2023 the Practice Committee met to consider whether to renew the conditions on Mr Persand’s registration. It concluded that continuing his suspension was not justified but that conditions should be imposed on his practice. Its core conclusions were as follows:

“In all the circumstances the panel has concluded that an order remains necessary on the grounds of public protection. The panel determined that the allegations are serious and wide-ranging that present a real risk of harm to patients and staff. It considered that Mr Persand has completed relevant training, however, he has not yet worked as a registered nurse and therefore, there is insufficient information to support that this

learning has been transferred into the workplace. Therefore, the risk of repetition remains and a consequential real risk of harm to the public.

The panel considered that a reasonable and fully informed member of the public would be concerned if a nurse facing such allegations were permitted to practice without restriction. Therefore, the panel concluded that an order is otherwise in the public interest in order to uphold the standards of the professions and the NMC as regulator.

The panel next considered whether an interim conditions of practice order would be sufficient to address the risk identified. Having considered the information before it, the panel decided that there were workable conditions that could be formulated that would sufficiently protect the public and appropriately address the alleged failings in Mr Persand's practice etc. The panel considered the multiple positive testimonials relating to the practice of Mr Persand, alongside his comprehensive training in relation to the regulatory concerns and his reflective piece”

- 18 Mr Persand currently works at a nursing home as a healthcare assistant. He has worked there since October 2022 and there is no evidence about any concerns relating to his work at this home. It seems clear that the disciplinary proceedings that are hanging over him have effectively prevented him from being able to work as a registered nurse, but these conditions have not prevented him obtaining the less remunerated role of being a care assistant. Accordingly, the fact that these proceedings are being taken against Mr Persand appears to have had a substantial effect on his professional career and, almost certainly his income, over a period which extends to 2 years.

The proper approach to making interim orders.

- 19 Article 31(2) of the Order gives the NMC Practice Committee the power to suspend a nurse who is subject to unresolved professional regulatory proceedings where the Practice Committee is satisfied that the proposed interim sanction is necessary for defined but limited purposes. It states the power to impose a suspension or condition arises where:

“..the Practice Committee is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of the person concerned, for the registration of that person to be suspended or to be made subject to conditions”

20 The reference to a suspension or the imposition of conditions being “*in the interests of the person concerned*” generally arises in cases where the nurse has mental (or possibly physical) health difficulties. That basis for making orders is not relied upon here and thus I am only concerned with sanctions that are imposed by the Practice Committee either (a) for the protection of members of the public or (b) otherwise in the public interest.

21 The imposing of sanctions in the public interest should be relatively rare. As Davis J said in *R (Sheikh) v General Dental Council* [2007] EWHC 2972 at paragraph 16:

“It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is, in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest”

22 Those observations are equally applicable to the suspension of a nurse as they are to the suspension of a doctor or dentist. It appears clear from the approach taken by the Committee in this case that the initial suspension was imposed, in part, because the Committee was concerned that sanctions were justified because “*an informed member of the public would be concerned if a registered nurse facing such allegations was allowed to practise without restriction whilst an investigation is carried out by the NMC*”. It seems to me that such an approach is inconsistent with the above dictum because it would justify suspension on public interest grounds in almost every case where a nurse faces serious allegations. I agree with Davis J that an order on public interest grounds is only justifiable in a relatively rare case. There must be something in the evidence of the individual case which far more substantial than anything arising here to justify a public interest suspension. That must be far more than a concern that a hypothetical member of the public might have a concern if no interim sanction was imposed. There were no other factors identified in this case to justify a public interest order and, to be fair to counsel for the NMC, when pressed she made it clear that she did not rely on public interest grounds to continue any interim sanction against Mr Persand. In my judgment, she was right to make that concession but, as nothing substantial has changed since June 2023, it must also follow that the Committee was wrong to have sought to rely on public interest grounds to make the orders in this case. It follows that this case is solely about whether conditions on Mr Persand’s right to practice as a nurse can be justified on the grounds of public protection.

23 I was told that it is hoped that this case will be completed within the next 9 months, but it may well be that this is too optimistic. By way of example, I note the following paragraph from the evidence:

“In Mr Persand’s reflection statement dated 14 June 2023, he denies that he or any other staff member omitted to administer prescribed medication to Resident A. He blames electronic system faults which erroneously recorded the administration as ‘omitted.’ The investigation was not able to explore this with the witnesses, as Mr Persand disclosed this information in the closing stages of the investigation and no reference was previously made by witnesses or in the safeguarding documentation of issues with the Home’s MAR system”

24 This witness statement from Mr Persand was received in June 2023. This paragraph suggests that the core defence advanced by Mr Persand has not yet been investigated by the NMC, despite the fact that they have been aware of this for some time. That omission may well cause further delays because, if Mr Persand is right about this point, the whole case against him will look very different. It is thus unclear when this case will finally get to be considered by a panel.

The principles to be applied for extensions of interim orders.

25 Counsel for the NMC drew my attention of *GMC v Hiew* [2007] EWCA Civ 369 where Arden LJ said that, in the case of the GMC, *“the courts should have the power and duty to consider whether any extension of time beyond the initial period is appropriate”*. Thus, the decision-making process the court has to undertake for an extension application is a primary decision-making function and not just a review function. At paragraph 28 Arden LJ said:

“In my judgment, the criteria must be the same as for the original interim order under section 41A(1), namely the protection of the public, the public interest or the practitioner's own interests. This means, as Mr Englehart QC, for the GMC, submits, that the court can take into account such matters as the gravity of the allegations, the nature of the evidence, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded and the prejudice to the practitioner if an interim order is continued. The onus of satisfying the court that the criteria are met falls on the GMC as the applicant for the extension under section 41A(7)”

The Court of Appeal are thus indicating that (a) the gravity of the allegations, (b) the seriousness of the risk of harm to patients, (c) the reasons why the case has not been concluded and (d) the prejudice to the practitioner if an interim order is continued, are all factors that a decision maker could properly take into account in making an interim orders decision. However I do not read this as being an exclusive list and there may well be other factors which become relevant on the facts of an individual case.

- 26 It seems to me that, in addition to the above factors, a court should also ask itself whether the NMC has been reasonably diligent in progressing the case. If the NMC has any unreasonable or unexplained periods of delay, that ought to count as a factor in favour of the discharge of an interim order because the delay may amount to an arguable breach of the nurse's rights under article 6. Any arguable breaches of the duty to bring a case to a conclusion within a reasonable time must, in my judgment, be a relevant factor for a committee or the court to consider in deciding whether it is still "necessary" to continue interim sanctions.
- 27 The Practice Committee has power under the Order to make an order for a period of up to 18 months. If the NMC wishes to extend the order it needs to apply to the High Court for an order and, on any application, a decision is made by the High Court applying the same criteria as the Practice Committee. It seems to me highly likely that the powers of the Practice Committee were limited to a period of 18 months under the terms of the Order because it was anticipated that most cases would be resolved within this period, and thus an application to extend time would be relatively unusual. However, as a result of the number of cases referred to the NMC and the continuing consequences of the Covid pandemic as well as the way that cases are investigated and managed by the NMC, it appears that cases are now taking far longer to resolve and that it is not unusual for cases to take several years to resolve, albeit I note that the NMC aims to resolve 80% of cases within 15 months. Nonetheless the cases before me suggest that relatively routine cases are now coming before the court where the NMC seeks extensions of orders.
- 28 I have been provided with a "Corporate Statement" by Mr Peter Boyce, the NMC Head of Care Presentation and Appeals, which seeks to explain the challenges faced by the NMC in discharging its functions and, in part, attempts to justify the delays in concluding NMC cases. This statement explains that NMC activity was affected by the pandemic, and how very difficult decisions needed to be made as to which cases to proceed with during the pandemic period and how progress could be made. The statement explains:

“The NMC’s fitness to practise work has been in a “recovery” phase since the start of 2021, which will continue for the foreseeable future. This has been characterised by a resumption of case work with no intention by the NMC to pause activity on a wholesale basis again, as well as the listing of an increasing number of all types of hearings, including the resumption of physical hearings at our hearing centres”

29 Mr Boyce further explains:

“A large package of improvement measures was drawn up and has continued to be built on and implemented, which has enabled the overall caseload to finally stabilise without growing further as well as reduce. The focus since the start of 2022 has been on making real inroads to reduce the caseload in line with our ambitious targets”

30 Mr Boyce then explains how the NMC has recruited more staff but there are areas where the NMC processes are still enormously slow. An example is the “legal review” stage where Mr Boyce says:

“There is a particular challenge at the CPP [Case Preparation & Presentation] stage, with cases taking around 5 months for allocation together with a 4 month turnaround for some legal reviews which set out the timetable and strategy for the case to be completed”

31 Whilst I fully accept that the NMC is working under pressure as a result of the number of historical referrals (albeit numbers are now falling), I find it hard to accept that it is consistent with the NMC’s duties under article 6 or appropriate for the internal NMC processes to be stalled for up 9 months, and in some of the cases I have seen longer, whilst each case is considered by a lawyer. Given that the inhouse legal resource of the NMC seems so stretched, it is perhaps surprising that Mr Boyce’s statement does not explain whether steps have been taken to out-source this legal function or whether this has even been considered or whether other steps could be taken to speed up the legal review process (and indeed whether this is really needed in many cases).

32 I accept that the NMC is working in very difficult circumstances given the number of cases and the need for a thorough and fair investigation in every case. Nonetheless, despite the helpful evidence of Mr Boyce, the evidence of the procedures followed in this case and a series of other cases in which I have been asked to make orders to extend interim orders

suggests that there are features of the delays in these cases which raise a substantial level of concern.

- 33 First, the overall pace at which the investigations are carried out by the NMC appears unnecessarily slow even where the facts are relatively straightforward, with gaps of extended numbers of months where virtually nothing happens on the file and where no new steps are taken to progress the investigations. There are examples of unjustifiable periods of inaction in this case but there are longer periods on a series of other cases that came before me. Further, the detailed and helpful chronologies prepared for cases often show that, where steps are taken by NMC staff to assemble evidence, they appear to be taken sequentially rather than simultaneously with the result that the overall investigation takes far longer than appears consistent with a duty of progressing the case with reasonable diligence.
- 34 Secondly, there often appear to be delays because referring agencies and other bodies are slow in disclosing documents to the NMC or are reluctant to confirm information to the NMC. The duty on the Investigating Committee under article 26(2)(c) is to “*take such other steps as are reasonably practicable to obtain as much information as possible about the case*”. The NMC has powers under article 25(1) of the Order to require anyone who is “*able to supply information or produce any document which appears relevant*” to a Fitness to Practice (FtP) investigation to provide the information or document to the NMC. In the cases in which I have seen, months and periods of over a year have elapsed whilst the NMC waits for NHS bodies and others to provide requested documents in an unredacted form or waits whilst potential witnesses confirm information. I accept that no NHS body or other person can be required to disclose documents where that would be a breach of the NHS body’s data protection obligations. Save for highly unusual circumstances, the Order provides a structured legal framework which requires disclosure of documents or information and it is manifestly in the public interest for that information to be provided. It is therefore hard to see what GDPR grounds could be relied upon to resist appropriate disclosure.
- 35 Article 44(4) of the Order makes it a criminal offence for a person to fail without a reasonable excuse to comply with requirement to provide information or documents requested by the NMC. It seems to me that the fact that Parliament has made failing to disclose documents when required by the NMC a criminal offence signifies the importance of the NMC being able to secure prompt disclosure of both documents and information. The fact that the statutory framework requires disclosure is not only in the interest of the NMC but will almost always be in the interests of the registrant. If disciplinary proceedings are brought against a registrant, it will usually be in the registrant’s interests for the investigation to be

completed as quickly as possible so that NMC can reach a decision whether the registrant does or does not have a case to answer. It is also in the interests of everyone for the matter to progress promptly to a hearing where there is a case to answer. Whilst there may be individual cases where a different approach could be justified, I consider that these powers have been given to the NMC with the intention that they should be used. I thus consider that it unlikely to be justifiable for the NMC to delay making progress in investigations for many months or over a year due to a failure by a third party to provide disclosure of information or documents unless, at the same time, the NMC has been making use of the powers given it by Parliament to require disclosure.

36 Thirdly, the internal processes followed by the NMC are not defined within the Order but are a matter of internal NMC administration. Those processes appear to be complex and lengthy, despite the fact that many of the cases involve relatively straightforward allegations of factual matters, and then the assessment as to whether the allegation, even if proven, would indicate an impaired fitness to practice. The latest figures I have been able to find indicate that the NMC imposed interim orders in 688 cases in 2022/23 many of which were taken in the month after the allegations are made to the NMC¹. However, about three quarters of cases do not progress to a disciplinary panel hearing. The number of cases where interim orders are made is significantly higher than the 553 cases where decisions were made by panels. Further, the number of nurses removed from the Register in 2022/23 was 191 but, in contrast, a higher number of 324 nurses were wholly suspended from practice whilst the investigatory procedures were continuing and about the same number were subject to conditions. Although I am conscious that general statistics can be used to support almost any argument, nonetheless it appears that the position is that interim orders are being made to suspend significantly more nurses from practice than are eventually struck off, and it seems inevitable that interim orders are made against a significant number of nurses against whom, once the screening processes are completed, no disciplinary proceedings are pursued.

37 As noted above, the delays in completing investigations and progressing regulatory proceedings under the internal NMC processes mean that interim orders are remaining in place for long periods of time. The increased periods of these orders mean that the risk of prejudice to the nurses who are subject to the orders becomes far greater than it would be if proceedings were able to be completed promptly. That factor suggests that the NMC should

¹ See https://www.nmc.org.uk/globalassets/sitedocuments/annual_reports_and_accounts/2023-reports-and-accounts/annual-report/nmc-annual-report-and-accounts-2022-2023.pdf at page 21.

be more cautious about imposing interim orders in cases where the orders are likely to remain in force for long periods.

- 38 The statutory scheme only permits an interim order to be imposed which meets the strict condition in article 31(2) that it is “*necessary*” for one of the two stated statutory purposes. It is however reasonably clear from the decisions made in this case that a relatively low bar was used by the Practice Committee to make the decision that an interim order was justified, without any intense focus on whether the order satisfied the test of being “*necessary*”.
- 39 In *General Medical Council v Hiew* the Court of Appeal confirmed that the onus was on the regulator to demonstrate that the order was necessary. However, it does not seem to me that there was any focused discussion as to what the GMC, which operated under a like statutory framework, needed to be able to prove to show in order to prove that an interim order met the test of necessity. There are multiple definitions setting out the meaning of the word “*necessary*”, in the Shorter Oxford English Dictionary. The majority include terms such as “*essential*” and “*that cannot be dispensed with or done without*”. Some further guidance on the meaning of the word “*necessary*” can be gleaned from the meaning that the High Court gave to the word in a different statutory context, but also one involving disciplinary processes. In *R (Hussain) v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin) where Green J (as he then was) said at paragraph 230:

“The test of necessity in the conditions means more than desirable but less than indispensable or absolutely necessary (see e.g. Goldsmith International Business School v Information Commissioner [2014] UKUT 0563 (AAC) at paragraphs [37])”

- 40 That approach seems to me to be broadly consistent with the approach taken by Davis J in *R (Sheikh) v General Dental Council* and King J in *Houshian v General Medical Council* [2012] EWHC 3458 (QB). There is thus a high bar which needs to be surmounted albeit one which, in a case where there is appropriate evidence, can be met.
- 41 It seems to me that, in every case, the NMC Committee and the Court, has to ask itself precisely why it is said to be necessary to impose an interim sanction on the nurse. If the case is that it is necessary to protect patients, then there needs to be an intense focus on precisely how and why the evidence demonstrates that patients may be at risk from the nurse and how serious that risk is. A case where patients can be shown to have suffered harm will clearly have more potency than a case, such as the present case, where there is very limited if any

evidence that any patient has come to harm. However, even if there is cogent evidence that a patient is at risk, a suspension will not usually be justified unless the imposition of conditions cannot reasonably protect patients from that risk.

42 In making this assessment, following *Hiew*, the Court has to take the allegations at their highest in order to assess whether, if they were to be proven “*justify the prolongation of the suspension*”: see paragraph 33. Some weight must be given to the cogency of the evidence, as the Court noted at paragraph 31 where Arden LJ said “*On the other hand, if the judge can clearly see that the case has little merit, he may take that factor into account in weighing his decision on the application*”.

43 Bringing these threads together, the NMC’s case is not that Mr Persand should be suspended from practice as a nurse but that conditions should be placed on his practice as a nurse. That may in part be because the Committee had a series of positive references for Mr Persand and the NMC is not now relying on the original allegations which started this investigation but other matters that arose during the investigation. The report of the Committee in June 2023 said:

“The allegations from [Care Home A] related to provision of safe and effective skin/wound care and failure to act upon concerns raised about that care. This panel noted that the NMC does not today put those allegations before it ...”

44 That suggests, as per *Hiew* at paragraph 31, I should accord the original allegations concerning failings by Mr Persand leading to harm to the resident at Care Home A little weight. There was, however, some evidence of his failure to administer medicines to the resident and failure to engage properly with colleagues. The highest that the case can be put on the allegations seems to me is that there is a potential for some risk to the public from Mr Persand being allowed unsupervised nursing practice where his alleged attitudinal problems may lead to staff problems or poor care. However, in working out the level of any continuing risk, it seems to me to be deeply unfair for the Committee or this court to rely on the fact that, despite doing remediation courses, Mr Persand cannot show that any risk has proved to have been reduced because he has not worked as a nurse since he completed the courses. Mr Persand was prevented from working as a nurse until June 2023 and, since that time, he has been subject to such a set of extensive and tight conditions that it is hardly surprising that no employer has taken him on in a nursing role. That argument is thus wholly circular and cannot justify continuing sanctions against Mr Persand. He has been unable to work as a

nurse because of the interim orders and so completion of the courses is the most he could do to demonstrate a reduction in risk.

- 45 The real question is whether, given that there is a risk, the NMC can show (with the onus being on the NMC) that it is “necessary” for sanctions to be imposed. There needs, in my judgment, to be something specific or particular about the circumstances of this case to explain why they are so serious that the test of necessity is met. Simply saying that, if a nurse was free to practise without being subject to conditions, such a circumstance would raise concerns in the minds of a member of the public is, in my judgment, wholly insufficient. Equally, saying that there is some limited risk to patients from a nurse’s clinical practice if he or she is allowed to continue to practice without restrictions is equally insufficient. It seems to me that the necessity test requires the NMC to show that, on the particular facts of a case, there are features of the case which mean that matters are so serious that it is justifiable to restrain the exercise of professional skills by a nurse at a stage when the allegations are unproven. The test is something close to saying that an interim order is essential, in the sense that a responsible regulator would not be acting properly in failing to act on a proven risk to the public. That seems to me to be the message from cases such as *R (Sheikh) v General Dental Council* and *Houshian v General Medical Council*. It does not seem to me that this was the approach taken by the Committee in this case where interim orders were imposed without an exacting inquiry being conducted to see whether they could really be said to meet the test of necessity.

Applying that approach to the present case.

- 46 I agree that the allegations against Mr Persand come nowhere near justifying a suspension order and I doubt that a suspension order was ever justified. The most that the allegations support is a case that unsupervised nursing practice by Mr Persand could give rise to some level of risk to patients due to his attitude to both fellow members of staff and patients. However, I find it very difficult to get a feel as to how serious that risk actually is, and I have some doubt as to whether it can be said the risk is so great that the “necessity” test is met. Nonetheless, I place some weight on the fact that the NMC panel have reached that conclusion and accept that they are an expert panel and that weight should be given to their conclusions. I thus accept that the NMC has satisfied me that some, albeit limited, conditions should be placed on Mr Persand’s practice as a nurse.
- 47 I was told that, having reached the decision to impose conditions, the precise conditions imposed by the Practice Committee were a “standard” set of conditions. However, having

reviewed those conditions, it seems to me that they are so extensive and so restrictive that it is nearly impossible to envisage how any employer would be prepared to employ Mr Persand as a nurse under those conditions, and I note that in practice he has only been able to secure work as a nursing assistant. Imposing a standard and extensive set of conditions seems to me to be wrong in principle because the test of “necessity” applies just as much to each individual condition imposed on a nurse as it does to any case of suspension. I thus have to ask whether each of the conditions satisfies that test. Some of them plainly do not.

48 Balancing as best I can the interests on both sides and in particular having had regard to the length of time that Mr Persand has been subject to conditions and is likely to continue to be subject to conditions before this matter is resolved, I am not convinced that all of the existing conditions of this extent are necessary but I am just persuaded that some limited conditions are appropriate to prevent Mr Persand working where he is the only nurse on duty.

49 It seems to me that conditions which have the effect that Mr Persand is not the sole nurse on duty is sufficient to protect the public, given the nature of the allegations and the age of the allegations. Looking at the conditions, I therefore accept that conditions 1, 2, 3 and 10 are justifiable, but it does not seem to me that the rest of the conditions are necessary. Further, condition 9 should be modified so that it reads:

"You must immediately give a copy of these conditions to any establishment you apply to (at the time of application)"

50 Clearly, if Mr Persand wants to work somewhere apart from his present work location, he will have to apply to the NMC to have condition 1 changed but I would expect that permission would readily and promptly be given as long as the new employer was fully informed about the fact that conditions applied. I thus grant the NMC's application in part, in the hope that varying the conditions will allow Mr Persand to return to working as a nurse, albeit under those conditions, as opposed to only, in practice, being able to work as a healthcare assistant.

51 Although I have partially accepted the NMC's case, the evidence in this and a series of other like cases has a number of worrying features. It is not clear to me from this case and a series of other cases that the high bar imposed by the legislation before an interim order is made is, in practice, being generally applied, particularly in the context of cases that are taking far too long to resolve. An interim order should not be imposed because the Practice Committee

have a concern that, if no order were to be made and there is a later patient safety incident, the NMC may be criticised.

- 52 Whilst I accept that the Practice Committee have a difficult job in balancing risks, the Order sets a deliberately high test of necessity. An interim order can only be imposed if, on the evidence for that individual case, a strict test of necessity for the imposition of an interim orders is established. The “necessary” test means that the Practice Committee has to be satisfied to a civil standard that it is really necessary to impose the order for one of the stated purposes and, if some form of sanction meets the necessity test, that no lesser form of sanction can be justified. That is a higher test than it being desirable for such an order to be made, albeit the test is not one as high as being absolutely essential. I also highlight there should be no such thing as a “standard” set of conditions because the necessity test has to be satisfied with regard to each condition on the facts of each individual case before it can be lawfully imposed.