

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

**Substantive Order Review Hearing
Friday 18 March 2022**

Virtual Hearing

Name of registrant: Airam Morales Cruz

NMC PIN: 15K0707C

Part(s) of the register: Registered Nurse – Sub Part 1
Adult Nursing (November 2015)

Area of registered address: Spain

Type of case: Lack of knowledge of English Language

Panel members: Deborah Hall (Chair, registrant member)
Carla Hartnell (Registrant member)
Alex Forsyth (Lay member)

Legal Assessor: Graeme Henderson

Hearings Coordinator: Taymika Brandy

Nursing and Midwifery Council: Represented by Yvonne Ferns, NMC Case
Presenter

Mr Cruz: Not present and unrepresented at the hearing

Order being reviewed: Suspension order (12 months)

Fitness to practise: Impaired

Outcome: **Strike off order to come into effect on 19
March 2022 in accordance with Article 30(1)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Cruz was not in attendance and that the Notice of Hearing had been sent to Mr Cruz's registered email address on 17 February 2022.

Ms Ferns, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, date and details of how to participate in the virtual hearing and, amongst other things, information about Mr Cruz's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In the light of all of the information available, the panel was satisfied that Mr Cruz has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mr Cruz

The panel next considered whether it should proceed in the absence of Mr Cruz. The panel had regard to Rule 21 and heard the submissions of Ms Ferns who invited the panel to continue in the absence of Mr Cruz.

Ms Ferns referred the panel to an email from Mr Cruz sent to the NMC on 10 March 2022 which stated: *'Unfortunately I will not be able to be in the audience but I would like to send a letter to the panel.'*

Ms Ferns noted that the panels discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *'with the utmost care and caution'* as referred to in the case of *R v Jones (Anthony William) (No.2)* [2002] UKHL. She also referred to the decisions of *General Medical Council v Adeogba* [2016] EWCA Civ 162 to note the overall interests of justice and fairness to all parties.

Ms Ferns submitted that Mr Cruz had voluntarily absented himself. She submitted that Mr Cruz is aware that the current order would be reviewed. Further, Mr Cruz has not made an application to adjourn. Ms Ferns submitted that there is no reason to suspect that adjourning this hearing would secure Mr Cruz's attendance on some future date. She also submitted that it is in the public interest for this mandatory review to take place without delay. Ms Ferns advised the panel that Mr Cruz will have the option of requesting an early review, or appealing any decision made, if he so wishes.

The panel has decided to proceed in the absence of Mr Cruz. In reaching this decision, the panel has considered the submissions of Ms Ferns, the representations from Mr Cruz, and the advice of the legal assessor. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted his reasons for not attending were set out in an email sent the NMC on 14 March 2022 which stated:

'Unfortunately, I do not feel qualified to attend a hearing telematically [sic]. Attach a letter in the other mail to be read at the hearing.'

The panel considered that it had no evidence that an adjournment would secure his attendance at a later date and there is a there is a strong public interest in the expeditious review of the case, due to the close expiry date of the order.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr Cruz.

Decision and reasons on review of the substantive order

The panel decided to replace the current suspension order with a striking off order.

This order will come into effect at the end of 19 March 2022 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the fourth review of a substantive conditions of practice order originally imposed for a period of two years by a Fitness to Practise Committee panel on 17 August 2017. This order was reviewed on 13 August 2019 and it was extended for a further 12 months. On the 17 August 2020 the order was reviewed and it was replaced with a suspension order for 6 months. This order was reviewed on 8 February 2021 and extended for a further 12 months.

The current order is due to expire at the end of 19 March 2022.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved by way of admission which resulted in the imposition of the substantive order was as follows:

'That you, a registered nurse:

- 1) Do not have the necessary knowledge of the English language to practise safely and effectively;*

And in light of the above, your fitness to practise is impaired by reason of your lack of knowledge of English.'

The third reviewing panel determined the following with regard to impairment:

'In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mr Cruz's fitness to practise remains impaired.

The panel noted that since the initial review hearing there had been no engagement from Mr Cruz until a week before this hearing when Mr Cruz provided written submissions.

The panel had regard to Mr Cruz's email dated 12 August 2019, and to the most recent email dated 29 January 2021. In both emails Mr Cruz indicated that he was working outside the UK, and continues to try to improve his English language skills. He also stated that he hoped that in doing so this would mean that the door would be open for him to return to the UK.

The panel observed that whilst Mr Cruz mentions that he is making efforts to improve his English language skills, the panel had no specific or documentary evidence to suggest he had undertaken any steps to improve his understanding and knowledge of English, and to demonstrate remediation of the original concerns in this case. There was also no evidence to suggest that Mr Cruz had explored or sought to undertake the International English Language Test System (IELTS), or any equivalent English language test accepted by the NMC. On this basis the panel observed that Mr Cruz is still limited in his insight.

The panel accepted that the current pandemic has caused cancellations and restrictions with regards to training and tests, but observed that Mr Cruz could have provided evidence of any attempts that he has undertaken to improve his English language skills. It observed that nurses are required to be competent in their knowledge of the English language to provide safe and adequate care to patients.

The panel observed that to deliver safe and effective practice, Mr Cruz needs to provide evidence that he has reached level 7 in the IELTS test or equivalent. In the absence of any evidence to that effect, the panel considered that a risk to patients remained if Mr Cruz were permitted to practise as a nurse without restriction.

The last reviewing panel determined that Mr Cruz was liable to repeat matters of the kind found proved. Today's panel considered that there had been no material change in Mr Cruz's English language skills and in light of this this panel determined that Mr Cruz remains liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Mr Cruz's fitness to practise remains impaired.'

The third reviewing panel determined the following with regard to sanction:

'The panel first considered whether to take no action but concluded that this would not protect the public and would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that due to the seriousness of the case and the public protection issues identified, an order that does not restrict Mr Cruz's practice would not be appropriate in the circumstances. The panel considered that Mr Cruz's failings were not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether a conditions of practice on Mr Cruz's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel noted that Mr Cruz had been subject to a conditions of practice order for three years and had made little attempt to fulfil those conditions. Therefore, the panel was not satisfied that Mr Cruz would be willing to comply with further conditions of practice and so determined that a conditions of practice order would not adequately protect the public or meet the public interest at this time.

The panel considered the imposition of a further period of suspension. It was of the view that now that Mr Cruz appears to have engaged with these proceedings, a suspension order would allow him further time to fully reflect and remediate. The panel concluded that a further 12 month suspension order would be the appropriate and proportionate response to both protect the public and satisfy the wider public interest. It would also afford Mr Cruz adequate time to take English language classes to evidence that he has reached the required level of English and to further develop his insight.

The panel considered a striking off order but determined that this would be disproportionate at this stage.

The panel considered that a further suspension order is the most appropriate and proportionate sanction available.'

Decision and reasons on current impairment

The panel has considered carefully whether Mr Cruz's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it, including the NMC bundle and written submissions from Mr Cruz. It has taken account of the submissions made by Ms Ferns on behalf of the NMC.

Ms Ferns provided the panel with the background to the case. She referred the panel to the relevant pages within the bundle.

Ms Ferns submitted that there remains current impairment and Mr Cruz has not provided evidence of remediation nor has he addressed the concerns of the previous panel.

Ms Ferns submitted that there is no documentary evidence before the panel today to suggest he had taken any steps to show improvement in his knowledge and understanding of English language, sought to undertake the IELTS or any equivalent to English language test. She referred the panel to a letter submitted by Mr Cruz which stated :

'I don't see myself prepared to pass an IELTS 7 exam where much more is required of that... I don't see myself with the skills and intelligence required by the IELTS'

Ms Ferns submitted that whilst there have not been any clinical concerns raised, there are concerns identified by the previous panel that remain due to the lack of Mr Cruz's knowledge of English language.

Ms Ferns submitted that this indicates he has not carried out the sufficient training and demonstrates no evidence of remediation. She submitted that Mr Cruz is unable to provide safe care to patients due to his lack of English and therefore remains impaired on the grounds of public protection. Furthermore, she submitted that there is also a finding of continuing impairment of the grounds of public interest in order to uphold proper standards of conduct and performance.

Ms Ferns submitted that the panel may wish to continue the current suspension order to give Mr Cruz the opportunity to re-engage with these regulatory proceedings, or to advise the NMC of his future intentions and further improvement of his English Language. She further submitted that if the panel did not want to continue this order, then the other appropriate option would be a striking off order due to Mr Cruz's insufficient engagement and non-compliance with the previous panel recommendations.

The panel heard and accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mr Cruz's fitness to practise remains impaired.

The panel considered that there has been no material change since the last review.

The panel considered that the last reviewing panel found that Mr Cruz had insufficient insight. At this hearing the panel noted the written submissions from Mr Cruz, however it noted that this gave it not real insight into any further evidence of training and that Mr Cruz had not complied with the previous panel's recommendations.

The panel noted the letter provided by Mr Cruz dated 10 March 2022 which potentially suggests Mr Cruz's English language has deteriorated since returning to Spain as he states:

'is true that when I lived in the UK it was much easier than Now, since I spoke and listened to English 24 hours a day during those 2 years,'.

The panel considered that the fundamental expectation is that a nurse is able to communicate with patients and colleagues for safe and effective practice. Nothing has changed over the past five years and Mr Cruz's engagement had been intermittent over the course of proceedings.

The last reviewing panel determined that Mr Cruz was liable to repeat matters of the kind found proved. Today's panel has not received any new evidence of Mr Cruz's attempts to improve his English language since the evidence of his ILET's provided to the original panel in 2017. In light of this, the panel determined that Mr Cruz remains liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest, which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Mr Cruz's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mr Cruz's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mr Cruz's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mr Cruz's lack of knowledge of English language was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether a conditions of practice on Mr Cruz's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel bore in mind the seriousness of the facts found proved at the original hearing and concluded that a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel was not able to formulate conditions of practice that would adequately address the concerns relating to his standard of English and noted that Mr Cruz had previously been subject to a conditions of practice order and had not complied. The panel further considered that Mr Cruz is not currently living within the UK in order to comply with conditions and has expressed that he is unlikely to return in the short-term.

The panel next considered imposing a further suspension order. The panel noted that Mr Cruz has not shown evidence of any attempt to improve his language skills and he had been given several opportunities to demonstrate engagement and improvement. Further, Mr Cruz has not demonstrated any insight into his previous failings. The panel was of the view that considerable evidence would be required to show that Mr Cruz no longer posed a risk to the public and he has been given a significant amount of time to evidence his improvement of his English language. Mr Cruz is not currently working in the UK and has no plans to return back to the UK or unrestricted practise and take the IELTS. The panel

determined that a further period of suspension would not serve any useful purpose in all of the circumstances and that a period of suspension cannot continue indefinitely.

The panel determined that it was necessary to take action to prevent Mr Cruz from practising in the future and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order.

This striking-off order will take effect upon the expiry of the current suspension order, namely the end of date in accordance with Article 30(1).

This decision will be confirmed to Mr Cruz in writing.

That concludes this determination.