THE HIGH COURT

JUDICIAL REVIEW

[2019/262 J.R.]

BETWEEN

PETER MCEVOY & LINDA MCEVOY

APPLICANTS

AND

THE PRELIMINARY PROCEEDINGS COMMITTEE AND

THE MEDICAL COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 29th day of July, 2019

Issues

1. The application herein is for leave to issue and serve judicial review proceedings by the applicants on the respondents. The matter came before me on the 24th of May, 2019 when I directed that the leave application would be on notice to the respondents and ultimately the date for hearing of the on notice leave application came before the Court on the 18th of July, 2019.

2. The amended statement of grounds is dated the 30th of May, 2019 although the verifying affidavit remains that of the 2nd of May, 2019 in respect of the original statement of grounds.

3. The applicants are seeking an order of certiorari quashing the decision of the Medical Council, in its meeting of the 6th/7th of February, 2019, then having considered the opinion of the Preliminary Proceedings Committee ("the PPC"), that no further action should be taken and indicated in a letter of the 7th of February, 2019 that this was a final decision.

4. It appears however from a reading of the reliefs sought in the statement of grounds aforesaid that the applicants are also seeking an order of mandamus directing the PPC to reconvene for the purposes of reconsideration of the applicants' complaints. To the extent therefore that such relief would necessarily involve an order quashing the opinion formed by the PPC on the 17th of January, 2019 (although not specifically sought), it does appear to me from the outset that the application for this relief is outside the time limits provided for by o.84, r.21(1) of the Rules of the Superior Courts.

5. There has been no application for an extension of time. In the statement of grounds under the heading grounds upon which such relief is sought, it is indicated that the applicants are seeking leave of the court pursuant to o.84 for judicial review of the opinion formed by the PPC.

6. The applicants received the decision of the second named respondent aforesaid on or about the 8th of February, 2019 and indicated that they lodged in the Central Office papers concerning the within judicial review application on the 2nd of May, 2019 and were therefore within the time limits prescribed by o.84 aforesaid. In this regard there are conflicting judgments within the High Court as to when the three-month period would end. Mr. Justice Humphreys in two decisions namely, *Burke v. Minister for Justice, Equality and Law Reform*, [2015] IEHC 614, and *McCreesh v. An Bord Pleanála* [2016] IEHC 394, was satisfied that lodging papers in the Central Office stopped time running. On the other hand, Mr. Justice Haughton in a decision of the 31st of May, 2017 in *Dermot McDonald v. An Bord Pleanála & Anor*, [2017] IEHC 366, took a different approach and determined that the time limit did not stop until the application for leave was made before the Court.

7. It does appear to me given this difference of opinion within the High Court, and notwithstanding that there was no affidavit before the court on the 19th of July, 2019 *vis-à-vis* an extension of time, the applicants could properly avail of the different views aforesaid to come within the ambit of o.84, r.21(3) for the purposes of securing an extension of time, if necessary.

8. The applicants contend that no extension of time is required in respect of the PPC opinion of the 17th of January, 2017, a view that I do not share and accordingly it appears that the challenge to the PPC opinion is out of time without explanation as contemplated by Order 84.

Background

9. The first-named applicant is the lawful husband and the second-named applicant is the lawful daughter of Eileen McEvoy, hospitalised on Wednesday the 9th of May, 2012 following a stroke. The complaint herein relates to the treatment of Mrs. McEvoy in the relevant hospital and later in another hospital by doctors A & B which it is complained resulted in Mrs. McEvoy being in a comatosed and vegetative state since the 10th of May, 2012.

10. The applicants made a complaint on 6th of June, 2017 to the Medical Council.

The claim was to the effect that doctors A & B were guilty of professional misconduct and/or poor professional performance.

11. The following provisions of the Medical Practitioner's Act, 2007 are relevant:-

> (a) Under s.2, "*Poor Professional Performance*" is defined as meaning a failure by the practitioner to meet the standards of competence which can reasonably be expected of medical practitioners practising medicine of the kind practised by the practitioner.
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> (b) Section 6 provides that the object of the Medical Council is to protect the public by promoting and better ensuring high standards of professional conduct and professional education, training and competence among registered practitioners.
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> (c) Section 17 provides that the members of the Council will be appointed by the Minister and consist of 25 persons as

therein after set out. At ss.2 of this section it provides that members of the Council shall perform their functions as such in the public interest.

(d) Section 20 provides that the Council may establish a committee including *inter alia* the PPC to give initial consideration to complaints.

(e) Section 57 provides that a person may make a complaint to the PPC concerning a registered medical practitioner on the grounds of *inter alia* professional misconduct or poor professional performance and the section goes on to provide that the PPC shall make reasonable efforts to ensure that the complainant is kept informed of all decisions and shall act expeditiously.

(f) Under s.58 the Medical Council may appoint persons to assist the PPC.

(g) Under s.59 the PPC shall, as soon as practicable, consider whether there is sufficient cause to warrant further actions.

(h) Under s.59, ss.9 the PPC shall before forming an opinion on whether there is sufficient cause to warrant further action consider any information supplied to it by the complainant.

(i) Section 51 provides that where the PPC is of the opinion that there is not sufficient cause to warrant further action being taken in relation to the complaint, the Medical Council shall be informed of that opinion and subsequently the Council may, after considering the opinion, do a number of things including deciding that no further action is warranted.

12. By letter of the 21st of January, 2019 the PPC communicated with the applicants and incorporated in that letter was a paragraph: -

> *"The Committee carefully considered all the material in relation to this matter including but not limited to the complaint form from Ms. Linda McEvoy and Mr. Peter McEvoy dated the 8th of June, 2017; letter of response from Dr. A. dated…; letter of response from Dr. B. dated…; and expert report from Professor Nick Losseff dated the 20th of September, 2018."*

13. During the course of the investigation by letter of the 21st of June, 2017 the PPC wrote to the applicants requiring the applicants to give all relevant documentation to the PPC. It is common case that a number of documents were furnished by the applicants to the PPC although not a medical report which the applicants indicated they had in their possession. In fact, ultimately there was before the PPC documents amounting to in excess of thirteen hundred pages the bulk of which came from the applicants.

14. Dr. Losseff is a Consultant Neurologist with extensive experience in developing services for stroke treatment and was the Consultant in the University College London Hospital at the date of furnishing his medical report of the 20th of September, 2018. In his conclusion at page 7 of 8 he indicated that he could not find any failings on the part of Doctors A & B and opined that the deterioration of Mrs. McEvoy was more likely than not to have happened as a result of the natural history of the stroke syndrome. Although he did indicate that it would be good practice to have discussions with the patient or her family (a possibility available to Dr. A on the 9th of May, 2012) nevertheless he opined that this was a minor system failure and was mostly a reflection of the complexity of the thrombectomy pathway. He also indicated that whether the thrombectomy had or had not been attempted it was more likely than not that the outcome for Mrs. McEvoy would have been the same.

15. Both Dr. A and Dr. B made submissions to the PPC.

16. Dr. A's submissions are contained in a letter of the 18th. September, 2017 to the effect that his decision was based on the best medical interest of Mrs. McEvoy as he saw them. He opined that Mrs McEvoy was neither helped nor harmed. Data available in 2012 indicated that the intervention undertaken was potentially helpful. Without such intervention Mrs. McEvoy would have the same clinical condition as she presently has.

17. Dr. B's views were expressed in a letter of the 21st of August, 2017 to the effect the procedure adopted was not experimental but rather an available and approved procedure.

18. The Applicants response to Dr. Losseff's report is contained in a 51 page letter of the 6th. December, 2018, in which the applicants extensively criticised such report including based on it's failure to deal with some records; relying on disputed records; containing incorrect statements; containing views inconsistent with 3 identified guidelines of 2008 and 2010 and failing to deal with the lack of family consent.

Jurisprudence

19. The following case law is engaged: -

(A) The Supreme Court in *G. v. DPP*. [1994] 1 IR 374, indicated that an applicant applying for leave by way of judicial review must make out a *prima facie* case and satisfy the Court *inter alia* that the facts averred to support a stateable ground for the reliefs sought and on those facts an arguable case can be made that the applicant is entitled to the reliefs sought. In the instant matter because the leave application was on notice, the court in making a determination under this *jurisprudence* has the benefit of the statement of grounds of the 30th of May, 2019 and the brief verifying affidavit of the 2nd of May, 2019 of the applicants together with a replying affidavit and a supplemental affidavit both of Dr. Rita Doyle of the 4th of July, 2019 and the 17th of July, 2019, on behalf of the Medical Counsel, together with an affidavit of Thomas Crotty sworn on the 5th of July, 2019 on behalf of the PPC, together with exhibits mentioned in the affidavits.

(B) In *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642, Henchy J. stated: -

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugn decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision maker should be held to have acted ultra vires, for the necessarily implied constitutional limitations of jurisdiction in all decision making which affects the rights or duly requires,* inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching*

his decision."

(C) In *O'Donoghue v. Veterinary Council* [1975] IR 398, Mr. Justice Kenny stated: -

> *"The test to be applied in determining whether a Tribunal (be it a judge or jury or disciplinary committee) is impartial is that a member is not impartial if his own interests might be affected by the verdict, or he is so connected with the complainant that a reasonable man would think that he would come to the case with prior knowledge of the facts or that he might not be impartial."*

(D) A further decision on bias is that of the Supreme Court in *Michael O'Driscoll v. Michael Hurley & Anor*, [2016] IESC 32, where Ms. Justice Dunne on behalf of a seven-member Supreme Court indicated that the applicable test was that expressed by Denham C.J. in *Good Concrete v. CRH plc & Anor* [2015] 2 IRM 289, the effect that the test to be applied in respect of perceived bias is objective – it is whether a reasonable person in all of the circumstances of the case would have a reasonable apprehension that there would not be a fair trial from an impartial judge.

(E) In *The Law Society of Ireland v. Andrew Walker* [2007] 3 IR 581, Finnegan P. was dealing with a status similar to a PPC examination of a complaint and indicated at para. 31 of his judgment that the standard of proof at an inquiry is as expressed by the Supreme Court in *O'Laoire v. Medical Council*, the 25th of July, 1996, namely the standard is the criminal standard of proof beyond reasonable doubt and that this is a factor which with regard may be had in determining whether a *prima facie* case is disclosed.

(F) In *Flynn v. The Medical Council* [2012] 3 IR 236, Mr. Justice Hogan in the High Court at para. 25 indicated that the PPC's decision must be *bona fide*, not unreasonable and factually sustainable. He further indicated that the Oireachtas by the enactment of the 2007 legislation enunciated a statutory test in relation to the question of whether further action should be taken in relation to any given complaint and the Act must be seen as a vehicle whereby the constitutional rights of *inter alia* the medical practitioners can be safeguarded. At para. 47 Mr. Justice Hogan followed the decision of Finnegan P. in Law Society v. Walker aforesaid to the effect that the Committee is entitled to determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held.

(G) In *Corbally v. The Medical Council & Ors*. [2015] 2 IR 304, the Supreme Court was satisfied that for poor professional performance to be established there must be reason to believe that what can be proved against him is something of a serious nature and there is a threshold of seriousness to be met before a *prima facie* case for an inquiry before the Medical Council is made out. It was indicated that such an interpretation provides a medical practitioner with adequate protection of his constitutional rights. In a summary of findings by McKechnie J. at para. 163 of the judgment it was indicated that negligent acts or contractual breaches may or may not qualify: Circumstances and contexts will determine.

(H) In a recent decision of Mr. Justice Meenan in *B.M. v. Fitness to Practice Committee* [2019] IEHC 106, at para.19 indicated that parties accepted that only complaints of a serious nature ought to go forward and this was recognised in *Corbally* aforesaid. Mr. Justice Meenan also summarised the role and function of the PPC being limited and therefore the requirement for fair procedure does not apply to the extent that it would apply before *inter alia* the Fitness to Practice Committee of the Medical Council. The respondents rely on para. 35 where the court expressed the view that it was not open to the applicant to subject the report secured by the PPC to forensic analysis. In my view this statement must be viewed in the context of that case, namely, the court was referring to a forensic analysis of Dr. Constable's report in circumstances where a Dr. Denihan later confirmed the opinion of the PPC was *bona fide*s, not unreasonable and factually sustainable.

Grounds of Claim

20. The statement of grounds raises the following grounds of claim by the applicants: -

(a) Need to consider all relevant evidence

21. The applicants complain that by reason of the extract from the letter of the 21st of January, 2019 herein before quoted that there was no explicit reference to the various responses furnished by the applicants and therefore the applicants' submissions were not taken into account. Furthermore, the applicants complain that despite being on formal notice of the existence of a report being a medical report held by the applicants the PPC did not request sight of same. They say that by letter of the 30th of January, 2019 the applicants indicated to the PPC that they had an updated expert clinical report dated the 7th of January, 2019.

22. The respondents resist this heading of claim on the basis that as provided for in the replying affidavit of Dr. Crotty aforesaid at para. 35 all material before the PPC was considered.

23. In fact, the letter itself states that the Committee carefully considered all material including but not limited to the expressly referred to communications. Given the volume of documents before the PPC it would be impossible to recite all documents as was before the PPC in such letter. The content of such letter does not appear to this Court to demonstrate any arguable grounds that because the communications from the applicants were not mentioned specifically in the letter same were not considered.

24. In relation to the Applicants' complaint that the PPC did not call for the medical report held by them identified as being in their possession since the 6th of June, 2017, it appears to me that it was for the applicants to tender the report if they wished the PPC to have some regard to it in particular having been called upon in a letter on the 21st of June, 2017 to forward all relevant documents. It is unsustainable to argue that the respondents failed to have regard to all relevant evidence by not calling for the report in circumstances where the applicants for their own reasons determined not to furnish the report. The first reference to the report of the 7th of January, 2019 was made in a letter of the 30th of January, 2019 which postdates the PPC opinion and in any event was not furnished

(b) Unreasonable and Irrational

25. The applicants complain that it was unreasonable and irrational of the PPC to reply on the report of Dr. Losseff aforesaid particularly as when that report was furnished to the applicants the applicants responded extensively in a letter dated the 6th of

December, 2018 highlighting various issues that they had with the report of Dr. Losseff. The applicants letter cannot be considered as a pier review of Dr. Losseff's report and the existence of negligence is not dispositive of poor professional performance or professional misconduct (see *Corbally*).

26. Dr. Losseff was an independent expert and clearly ultimately his views differed substantially from the views of the applicant. To grant the applicant leave on this ground would be for the Court to entertain the merits outside the scope of *Keegan*, rather than as is required in a judicial review, to ensure that the lawfulness of the process. It is clear from the *jurisprudence* aforesaid that the opinion of the PPC must be *bona fide*, reasonable and factually sustainable which in my view it clearly is notwithstanding that Dr. Losseff differs from the views of the applicants. The decision cannot be said to be plainly and unambiguously flying in the face of fundamental reason and common sense (*Keegan*).

(c) Bias and Bad Faith

27. In the events the allegation of bias and bad faith arises because of the respondents' website identifying various council members including the chairperson thereof. The allegations are directed towards the involvement in the decision making process of Mr. John Gleeson Solicitor and Mrs. Ann Carrigy, former Chairperson. Dr. Crotty in his affidavit at para. 27 and further at para. 44 to 50 deals with the absence of Mr. Gleeson in any decision making process and the fact that Mrs. Carrigy used to be a member of the Council until her retirement in 2018. In para. 6 and 7 of the replying affidavit of Dr. Doyle the fact that Mr. Gleeson was not present for consideration when the matter came before the Medical Council is also deposed to.

28. At para. 50 of the affidavit of Dr. Crotty it is stated that the erroneous detail on the Medical Council website was due to an administrative error and was inadvertent. The erroneous detail was removed when it came to the respondents' attention. The applicants suggest that this is an incredible assertion to make and is unbelievable in particular as the correct detail was not updated on the website until relatively recently.

29. Further the applicants suggest that Mr. Gleeson did participate in a meeting of the 26th of February, 2019 and also participated in the dispatch of a letter to the applicants on the 6th of March, 2019.

30. Given that the meeting of the 26th of February, 2019 occurred following the final decision of the Medical Council and the letter of the 6th of March, 2019 was dispatched following such final meeting, Mr. Gleeson's participation at that time is not relevant and cannot amount to bias, fraud or bad faith on the part of the respondents or either of them in or about the opinion/decision communicated in letters of the 21st of January, 2019 and the 7th of February, 2019.

31. Dr. Crotty's explanation in his affidavit of the 5th of July, 2019 as to what occurred with the website has not otherwise been countered in affidavit and notwithstanding the Applicants scepticism represents the only sworn evidence o the court and therefore the applicants scepticism alone is insufficient to contradict the contents of the affidavit.

32. In the circumstances therefore I am satisfied that it is not arguable that either the PPC or the Medical Council was biased, acted fraudulently or was motivated by bad faith by reason of the status vis-à-vis the website or by reason of the alleged involvement of Dr. Gleeson and Mrs. Carrigy.

(d) A Decision Contrary to Public Policy

33. This is the final ground although in suggesting that this might be a ground of seeking judicial review it should be highlighted that the applicants in the statement of grounds acknowledge the jurisdiction of the court is limited to a consideration of the management of the applicants' complaint by the PPC and the Medical Council. It appears that the applicants wish to appraise the court of wholly adverse public policy implications of the Council's decision and the incompatibility with prevailing statue, Constitutional and EU Law - offences of assault, assault causing harm and endangerment set out in the provisions of the Non-Fatal Offences Against the Person Act 1997; un-enumerated rights to bodily integrity pursuant to Article 40.3 of the Constitution and Articles 3, 4 and 7 of the Charter of Fundamental Rights. Based on the foregoing it is suggest that the decisions of the PPC and of the Medical Council cannot be legally correct.

34. In my view the alleged breach of statute Constitutional and EU Law are directed at the alleged matters which occurred on the 9th of May, 2012 rather than the manner in which the respondents conducted their various statutory obligations on foot of the 2007 Act therefore the limited detail under the heading of a decision contrary to public policy should be considered entirely unsustainable for the purposes of grounding either an order of certiorari or mandamus, in particular having regard to the generalised reference to the quoted legislation.

Conclusion

35. I am satisfied in all of the circumstances based on the foregoing and the material before this Court that:-

> (a) the existence of an arguable case must be reviewed in the light of the dicta in *O'Laoire* providing for a standard of proof as being beyond a reasonable doubt at PPC inquiry stage;
>
> (b) on the facts presented to the Court the applicants cannot maintain an arguable case that they are entitled to the reliefs and indeed the totality of the facts do not support stateable grounds for the reliefs sought
>
> (c) Leave is therefore refused.